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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

VS.

DAVID KERK LONG,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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QUESTIONS PRESENTED

I.

WHETHER POLICE OFFICERS AT A TRAFFIC STOP ACTED UNREASONABLY UNDER TERRY v OHIO AND US CONST, AM IV IN LIFTING THE FRONT SEAT CENTER ARMREST OF DEFENDANT'S CAR TO INVESTIGATE THE "LEATHER" ARTICLE PROTRUDING THEREUNDER (VISIBLE FROM OUTSIDE THE CAR), AFTER THEY SEIZED A FOLDING HUNTING KNIFE FROM THE CAR FLOORBOARD (VISIBLE FROM OUTSIDE THE CAR) AND THE POLICE ARE CONTINUING THEIR INVESTIGATION TO DETERMINE IF THE DISORIENTED DEFENDANT WILL BE PERMITTED TO RE-ENTER THE VEHICLE TO OBTAIN THE VEHICLE REGISTRATION OR WHETHER THE DEFENDANT WILL BE ARRESTED?

II.

WHETHER THE SEIZURE OF 75 LBS. OF MARIJUANA FROM THE TRUNK OF DEFENDANT'S IMPOUNDED CAR FOLLOWING HIS ARREST VIOLATED SOUTH DAKOTA v OPPERMAN OR WAS THE "FRUIT" OF THE ILLEGAL ARMREST "SEARCH" PER WONG SUN v UNITED STATES?

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

VS.

DAVID KERK LONG,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

NOW COME the People of the State of Michigan by their attorneys FRANK J. KELLEY, Attorney General; Louis J. Caruso, Solicitor General; and Leonard J. Malinowski, Assistant Attorney General; and prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in the above entitled cause on June 14, 1982.

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported at .... Mich ....; .... NW2d .... (1982) and is appended as Appendix A. The Michigan Court of Appeals' opinion is reported at *People* v *Long*, 94 Mich App 338; 288 NW2d 629 (1979), appended as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Michigan Supreme Court was issued June 14, 1982, and the jurisdiction of this court is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV of the United States Constitution reads:

> The right of the People to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Art 1, § 11 of the Michigan Constitution, 1963 reads:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceedings any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

STATEMENT OF FACTS

Shortly after 12 midnight of August 24-25, 1977, Barry County Sheriff deputies pursued a speeding car. The speeding car stopped with its front end in a roadside ditch and the car sitting broadside on the highway. David Long, the driver and sole occupant, got out of the vehicle leaving the car door open and approached the two deputies who asked Long for identification. Defendant Long gave no response. One deputy repeated the request and Long silently produced his driver's license. The deputy asked Long for his vehicle registration; Defendant Long gave no response. The deputy repeated his

request and Long wordlessly turned and walked back towards his open car. The deputies formed an opinion that Long "appeared to be under the influence of something," and that "open intox" might be in the car. (Preliminary Exam Tr, pp 4-6, 19-20; R, pp 127-131, 181).

Following Long back to the opened door of Long's car, both deputies saw, by the light from the opened door, a folded hunting knife (4" blade, 9" knife when extended) on the floorboard of the driver's side of the car. Standing outside the car, one deputy seized the knife while the other deputy frisked Long for further weapons, producing none. (Preliminary Exam Tr, pp 6, 48-49; R, pp 131-132, 167).

One deputy shined his flashlight into the front seat area specifically to look for more weapons before letting Long re-enter the vehicle to produce a vehicle registration. The deputies were aware of the danger they faced and the need for further investigation. (Preliminary Exam Tr, pp 6, 24-29, 34-35, 48-49). The deputy saw a leather-like object protruding from under the folded down center armrest of the front seat. Kneeling on the front seat, the deputy flipped the center armrest up and saw a leather pouch big enough to hold another weapon. Before touching the pouch, the deputy saw a plastic baggie extending out from the pouch, containing a grass-like substance that looked like marijuana. The deputy took the pouch outside the car and both deputies believed the grass was marijuana. The pouch also contained other suspected drugs. (Preliminary Exam Tr, pp 6-8, 29-30; R, pp 133-139, 155-159).

Defendant Long was arrested for possession of marijuana. The deputy searched the interior of defendant's car and found a car title in the glove box but no vehicle registration. (Preliminary Exam Tr, p 8; R, p 140).

The deputies then impounded defendant Long's car. Defendant Long had no car trunk key. The car trunk lock was missing. Before calling the tow truck, a deputy inserted his pocket-knife in the trunk lock hole and lifted the trunk lid to find two large bags which were torn, revealing their contents. The bags contained 75 pounds of marijuana. (Preliminary Exam Tr, pp 9-14; R, pp 140-144).

The validity of the armrest search and the subsequent trunk search following defendant's arrest was raised by argument during defendant's preliminary examination on September 22, 1977, (Preliminary Exam Tr, pp 11-13). The district judge's written opinion of December 23, 1977, upheld the armrest search as proper protective search and the trunk search as a valid inventory search and as a search incident to defendant's valid arrest. Defendant filed a pretrial motion to suppress and to quash based on the invalidity of the searches; this motion was denied by the circuit judge at the April 28, 1979, pretrial hearing. The circuit judge, on independent review, found the armrest and truck searches reasonable as valid protection and proper inventory. Defendant again raised the search issue during trial by a motion to reconsider the denial of suppression (R-77-79), and the trial judge denied reconsideration as unwarranted, holding both searches reasonable and distinquishable from the state and federal case cited by defendant (R-117-119). Towards the close of the prosecution's case, defendant again sought exclusion of the tendered marijuana sample-exhibits as the fruit of the unreasonable auto searches (R-189-191). After argument, the trial judge again ruled the auto searches were valid protection and proper inventory (R-193-194).

Defendant was convicted of possession of marijuana [MCL 333.7403(2)(d); MSA 14.15(7403)(b)(4)], and the Michigan Court of Appeals, 94 Mich App 338; 288 NW2d 629 (1979) affirmed the conviction, holding both the armrest search valid

under *Terry* v *Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), and the inventory trunk search valid under *South Dakota* v *Opperman*, 428 US 364; 96 S Ct 3092; 49 L Ed 2d 1000 (1976) and the US Const, Am IV. The Michigan Supreme Court reversed citing US Const, Am IV and Mich Const 1963, art 1, § 11, and holding that *Terry, supra* did not authorize a protective search of an area, and that the trunk search was an illegal "fruit" of an invalid arrest per *Wong Sun* v *United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963). The dissenting chief justice would affirm the armrest search as proper protection, and the trunk search as proper inventory. Another justice, partially dissenting, would affirm the armrest search as proper protection, but would reverse the inventory trunk search as invalid.

REASONS FOR GRANTING THE WRIT

The Michigan Supreme Court's decision relied on *Terry* v *Ohio* and US Const, Am IV and merely cited the Mich Const 1963, art 1, § 11. The Michigan Supreme Court has interpreted Mich Const 1963, art 1, § 11 as being neither more nor less restrictive than US Const, Am IV concerning "any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state." Mich Const 1963, art 1, § 11; *People* v *Moore*, 391 Mich 426; 216 NW2d 770 (1974). The Michigan Supreme Court relied exclusively on *Terry* v *Ohio, supra*, and one federal case to reverse the Michigan Court of Appeals. The lower federal courts have split on the scope of the *Terry* "stop and frisk" to include an area frisk, *e.g.* no area frisk, *Canal Zone* v *Bender*, 573 F2d 1329 (CA 4, 1978); area frisk allowed, *United States* v *Rainone*, 586 F2d 1132 (CA 7, 1978), cert den 440 US 980; 99 S Ct 1781; 60 L Ed 2d 239 (1979); *United States* v *Powless*, 546 F2d 792 (CA 8, 1977) cert den 430 US 910;

97 S Ct 1185; 51 L Ed 2d 588 (1977). This conflict, in an important area of constitutional interpretation, should be settled by the United States Supreme Court.

Given the recent reaffirmation of the limited expectation of privacy regarding automobiles and any containers therein by *United States* v *Ross*, —— US ——; 102 S Ct ——; 72 L Ed 2d 572 (1982), and given that *Terry* did not limit itself by explicit terms to personal frisks alone, and given that *Terry* has justified the stopping of automobiles, and given the *Terry* rationale of balancing the necessary protection due to investigating police with the limited intrusion of a citizen's Fourth Amendment rights occasioned by police conducting a justified investigation, the lifting of the driver's armrest in this case to investigate the leather object visible from outside the immobilized car (after one weapon had already been seized from the car), before letting defendant re-enter the car to get his vehicle registration therefrom, was not a violation of *Terry* v *Ohio* or of US Const, Am IV. Lifting the armrest to look at the visible object under it after finding a hunting knife on the car floor is no more intrusive than frisking a bump in a person's clothing during an investigation of a criminal suspect believed to be armed. Petitioner believes that the Michigan Supreme Court's decision in this case is in conflict with the *Terry v Ohio* protective frisk rationale, and the US Const, Am IV and those lower federal and state cases that uphold a limited automobile frisk under the *Terry* rationale.

The dissenting chief justice of the Michigan Supreme Court found that the inventory trunk search of the impounded car did not violate *South Dakota* v *Opperman, supra;* see also *Michigan* v *Thomas*, —— US —— (United States Supreme Court #81-593, reported at 31 CrL 4103, 1982), and *United States* v *Ross, supra.*

The limited frisk of the car leading to defendant's probable cause arrest for possession of marijuana present under the armrest could justify the police belief that they could search the entire car including the trunk, *United States* v *Ross, supra*. Even without probable cause to search the trunk, the police validly arrested the defendant-driver and impounded the car. Pursuant to their caretaking duty, the police conducted a valid inventory search of the car trunk to secure its contents, because the driver who was the sole occupant of the car was precluded from driving the car himself. Cf. *South Dakota* v *Opperman, supra; Michigan* v *Thomas, supra; People* v *Long*, 94 Mich App 338; 288 NW2d 629 (1979).

CONCLUSION

Petitioner submits that the decision of the Michigan Supreme Court conflicts with *Terry* v *Ohio, supra*, and US Const, Am IV so that plenary review should be granted.

APPENDIX "A"

NOTE: Where possible, a syllabus (headnote) such as this will be released at the time the opinion is released. This syllabus is *not* a part of the opinion of the Court but has been written by the Reporter of Decisions as a summary of the case for the convenience of readers. See *United States* v *Detroit Lumber Co*, 200 US 321, 337; 26 S Ct 282; 50 L Ed 499 (1906).

PEOPLE v LONG

Docket No. 64416. Argued January 6, 1981 (Calendar No. 5).—Decided June 14, 1982.

David K. Long was convicted by a jury in Barry Circuit Court, Hudson E. Deming, J., of possession of marijuana. The trial court denied the defendant's motion to suppress, as unconstitutionally obtained, evidence seized from the interior and trunk of defendant's car by two deputies of the Barry County Sheriff who had stopped the defendant's car for speeding. The prosecutor contended that the deputies had made a "protective" search of the interior of the automobile after it came to a stop because the defendant appeared to be "under the influence of something" and the deputies saw a folded Browning knife on the floor of the driver's side of the car. One deputy picked up the knife, while the other conducted a pat-down search of the defendant. Then the first deputy searched the defendant's vehicle, and found a leather bag containing a plastic bag of marijuana under the armrest of the front seat. The deputies decided to arrest the defendant for possession of marijuana and to impound the automobile. They then opened the trunk, and inside they found two paper bags, containing approximately 75 pounds of marijuana. The Court of Appeals, Cynar, P.J., and D. F. Walsh and Be-

beau, JJ., affirmed, holding that the search of the interior of the automobile without a warrant was a reasonable "protective" search and that the search of the trunk was permissible to make an inventory of the contents of the impounded automobile (Docket No. 78-3810). The defendant appeals.

In an opinion by Justice Kavanagh, joined by Justices Williams, Levin, Fitzgerald, and Ryan, the Supreme Court *held:*

The search of the defendant's car without a warrant was proscribed by the Fourth Amendment and the Michigan constitution, and the evidence obtained pursuant to the unconstitutional search should have been suppressed.

1. There is a narrowly drawn authority to permit a reasonable search for weapons, without a warrant, for the protection of a police officer, where the police officer has reason to believe that he is dealing with a person who is armed and dangerous, regardless of whether he has probable cause to arrest. Only a limited pat-down search of a person suspected of criminal activity is authorized, rather than the search of the area around the person. Without deciding whether the rationale of a protective search can ever be extended to the area within the suspect's reach, the Supreme Court concluded that under the facts of this case there is no justification for such an extension of the case law.

2. When the search of the interior of the automobile was conducted, the defendant was standing at the rear of the vehicle under the control of one deputy and the other deputy was between the open door of the vehicle and the defendant. The deputies had conducted a pat-down search of the defendant and had found no weapons; any weapons which might have been hidden

in the car, after the deputies picked up the knife, would have been out of the reach of the defendant, and thus did not pose a danger to the deputies.

3. A search and seizure without a warrant is unreasonable per se and violates the Fourth Amendment of the United States Constitution and the state constitution unless it is shown by the prosecution to be within one of the exceptions to the rule. The protection of police officers and other persons nearby cannot justify the search of the automobile in this case, and the prosecutor does not contend that the search can be justified by other exceptions to the constitutional requirement of a warrant. Therefore, the search of the interior of the vehicle was proscribed by the Fourth Amendment and the Michigan Constitution, and the evidence obtained by the search should have been suppressed.

4. The people seek to justify the search of the trunk without a warrant either as a search to inventory impounded property or as a search incident to the arrest of the defendant. The search of the trunk occurred after the decisions by the deputies to arrest the defendant for possession of marijuana found under the armrest of the seat and to impound the automobile. The defendant's arrest was based on evidence obtained from the interior of the automobile by unlawful action of the deputies, and the evidence of marijuana found in the trunk was the "fruit" of that illegality which should have been suppressed.

The defendant's conviction is reversed.

Chief Justice Coleman, dissenting, rejected as unpersuasive the distinction between a limited pat-down search of the person and a search of the area around the person where the police officer has reason to believe that the person is armed and dangerous.

1. The purpose of a limited protective search for weapons is not to discover evidence of crime, but to allow the police officer to pursue his investigation without fear of violence. Other courts have upheld protective searches of the interior of a vehicle while the occupants were detained outside it because they were not under arrest and could have returned to the vehicle when the encounter was ended. In this case, the defendant was entering the vehicle to retrieve the registration when the deputy sheriff observed a knife on the floor of the vehicle. Accordingly, a claim that a protective search is permitted cannot be summarily rejected on the ground that there was no danger. If the possibility that a suspect will re-enter his vehicle after an encounter with the police ends is sufficient to support a protective search, the fact that he is attempting to enter the vehicle while the confrontation continues is also sufficient.

2. In this case, the sheriff's deputies were confronting a person suspected of speeding, whose car ended up in a ditch. The defendant met the deputies at the rear of his car. He failed to answer their questions, began walking back toward the door of his car while he appeared to be under the influence of something, and acted scared. These observations and the knife on the floor of the car gave the officers reason to believe they were dealing with an armed and dangerous person. A reasonably prudent officer would be justified in believing that he was in danger; therefore, the officer was permitted to conduct a protective search.

3. Considering all the circumstances, including that one weapon had already been found and that the officer saw a leather pouch large enough to hold another weapon under the driver's armrest, the officer could have reasonably concluded that safety required further investigation. Lifting the armrest was an action reasonably designed to uncover a hidden weapon, because it would permit the officer to investigate whether the contents of the pouch could be inferred from its outward appearance, or by patting down or frisking the pouch. In contrast to the gravity of the danger confronting the officers, raising the armrest was a minimal intrusion into the defendant's expectation of privacy in the automobile when compared with the intrusions which have been allowed in other cases.

4. Raising the armrest in a protective search of the interior of the defendant's automobile is not an unreasonable search prohibited by the Fourth Amendment or by the state constitution. Then the contents of the open pouch, a plastic bag containing marijuana, were in the plain view of the officer, who properly seized the contraband and arrested the defendant. Review of the other issues raised by the defendant discloses no error requiring reversal.

Justice Moody, concurring in the result, agreed generally with the analysis of Chief Justice Coleman in her dissent. However, he would hold that admission of the marijuana found in the defendant's trunk into evidence was error requiring reversal.

1. The defendant, at the request of the police, was in the process of entering his automobile to obtain his registration and insurance certificates when an officer saw a knife in plain view. This discovery reasonably led the officers to search the defendant. It was reasonably

appropriate and consistent with the principles announced by the Supreme Court of the United States for the officers thereafter to conduct a brief search of the interior of the automobile for weapons, limited to areas in which a weapon could be concealed, yet be accessible. The subsequent discovery of the marijuana, visible under the driver's armrest, provided probable cause for the arrest and was admissible as evidence.

2. The search of the trunk of the automobile and the seizure of the marijuana therein without a warrant was unreasonable and violated the Fourth Amendment to the United States Constitution. The people sought to justify the seizure as having been made pursuant to a valid inventory search following the defendant's arrest and the decision of the police to impound the automobile. However, unlike the situation in the case in which the Supreme Court of the United States upheld a valid inventory search, in this case the defendant was present at the time of the asserted impoundment, he was not asked if he wished an inventory of the vehicle's contents to be conducted, and the site of the impound lot was secure. In addition, the police had no standard departmental policy pertaining to inventory searches. The personal "standard procedure" of the officer who conducted the inventory does not meet the requirements of reasonableness suggested by the Supreme Court of the United States. Without a departmental policy, too much discretion is placed in the hands of the officer, resulting in the possibility that his decision to conduct a search may be arbitrary.

94 Mich App 338; 288 NW2d 629 (1979) reversed.

STATE OF MICHIGAN
SUPREME COURT

FILED JUNE 14, 1982

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v DAVID KERK LONG, Defendant-Appellant.	No. 64416

BEFORE THE ENTIRE BENCH

KAVANAGH, J.

The defendant, David Kerk Long, appeals his conviction of possession of marijuana. He contends that evidence of the marijuana found in the interior and trunk of the automobile he was driving should have been suppressed as the product of unconstitutional searches. We reverse.

Shortly after midnight on August 25, 1977 while Deputies Howell and Lewis of the Barry County Sheriff's Department were on routine road patrol, they observed a car traveling past them in the opposite direction at an excessive speed. They turned their vehicle around and pursued the speeding vehicle. They saw the vehicle make a left turn, proceed down a side road, then swerve. The vehicle came to a stop with the front of the car in a shallow ditch and the back of the car on the roadway.

As the deputies approached, the defendant, the only occupant of the car, got out of the car, leaving the driver's side door open, and met the deputies at the rear of the car. Deputy Howell asked the defendant to produce his driver's license. The defendant made no response. The deputy re-

peated his request, and the defendant produced his license. When asked for his vehicle registration and proof of insurance, the defendant again made no response. When the request was repeated, the defendant began walking toward the open door. At this juncture, Deputy Howell had formed the opinion that the defendant "appeared to be under the influence of something".

The deputies followed the defendant. As they approached the open door, the deputies saw a closed folding Browning knife on the floorboard of the driver's side.[1] The defendant was told to halt and put his hands on the roof of the car. He did. One deputy picked up the knife while the other deputy conducted a pat-down search of the defendant, which produced no weapons.

Deputy Howell then shined his flashlight into the front seat of defendant's car to search for other weapons and saw "something leather" under the armrest. He knelt in the vehicle, lifted the armrest and observed an open leather pouch containing a small plastic bag of what appeared to be marijuana. According to the testimony of the deputies at trial, Mr. Long was standing by the rear of the car under the control of Deputy Lewis during Deputy Howell's search.

Deputy Howell removed the pouch and showed it to Deputy Lewis. The defendant was arrested for possession of marijuana. The interior of the car was searched for additional contraband, and the glove compartment was searched for the registration certificate. Neither was found.

The deputies decided to impound the car. Deputy Howell asked the defendant if he had a trunk key. The defendant

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[1]

Browning is a brand of knife. This knife had a four-inch blade. The defendant was not charged with carrying a concealed weapon in violation of MCL 750.227; MSA 28.424.

stated that he had no key. The deputy, noticing that the trunk lock had been punched out, used his pocket knife and reached in and unlatched the latch. Deputy Howell testified as to why he opened the truck as follows:

> "Number one, because I already found marijuana, suspected marijuana, in the interior of the car, there may have been more in the trunk. Secondly, I check them for valuables. I do."

Upon opening the trunk the deputy found two paper bags, which were split open, containing approximately 75 pounds of marijuana.

The defendant was handcuffed, placed in the police car and taken to the sheriff's department along with the towed car.

At the preliminary examination and at trial the defendant moved to suppress evidence of the marijuana obtained through the searches of the interior and trunk of the car. These motions were denied and the defendant was subsequently convicted of possession of marijuana.

On appeal, the Court of Appeals affirmed the defendant's conviction. 94 Mich App 338, 350; 288 NW2d 629 (1979). That Court held that "Deputy Howell's precautionary lifting of the front seat armrest prior to allowing defendant to re-enter his automobile was constitutionally valid as a protective search under the *Terry* doctrine."[2] 94 Mich App 344. The Court of Appeals found "no reversible error in the trial judge's determination that the deputies' inspection of the

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[2]
Terry v *Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

trunk was made pursuant to a proper inventory of the type approved by *Opperman*[3] and its progeny." 94 Mich App 350.

The first issue on appeal is whether Officer Howell's warrantless search of the interior of the vehicle, while the defendant was standing near the rear of the car under the control of another officer, violated the constitutional proscription against unreasonable searches and seizures.[4] We hold that the search was unconstitutional and reverse. The Court of Appeals erroneously applied the principles of *Terry* v *Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), to the search of the interior of the vehicle in this case.

In *Terry*, the United States Supreme Court authorized a limited warrantless protective search of the person during an investigatory stop. Prior to the stop, the police officer had observed two men involved in suspicious behavior for 10 to 12 minutes. The officer suspected the two men of "casing a job, a stick-up" and considered it his duty to investigate further. 392 US 6.

The Court held "that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime". *Id.*, p 27. The test set forth by the United States Supreme Court to justify the warrantless protective search "is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger". *Id.*

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[3]

South Dakota v *Opperman*, 428 US 364; 96 S Ct 3092; 49 L Ed 2d 1000 (1976).

[4]

US Const, Am IV; Const 1963, art 1, § 11.

The limited authority to search was emphasized by the Court when it said "[t]he sole justification of the search • • • is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer". *Id.*, p 29.

The officer's entry into the vehicle cannot be justified under the principles set forth in *Terry*. *Terry* authorized only a limited pat-down search of a *person* suspected of criminal activity. That case did not authorize the search of an area.[5]

At the time the search was conducted, the defendant was standing near the rear of the vehicle under the control of Deputy Lewis. Deputy Howell was positioned between the open door of the vehicle and the defendant. The deputies had conducted a pat-down search of the defendant after seeing the knife in the car and had found no weapons.[6] Any weapon which might have been hidden in the car would have been out of the reach of the defendant and thus not

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[5]

Chimel v *California*, 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969), and *New York* v *Belton*, ... US .....; 101 S Ct 2860; 69 L Ed 2d 768 (1981), authorized warrantless area searches incident to arrest. In this case, however, the defendant had not been arrested prior to the search of the interior of the car. Compare *Adams* v *Williams*, 407 US 143; 92 S Ct 1921; 32 L Ed 2d 612 (1972), where the person of the defendant seated in a car was properly searched under *Terry*.

[6]

The propriety of the pat-down search is not before us. The government does not allege that seeing the folded knife on the floor of the car gave them probable cause to search the car. Thus *Robbins* v *California*, ... US .....; 101 S Ct 2841; 69 L Ed 2d 744 (1981), is inapposite as the court in that case addressed the propriety of an automobile search conducted pursuant to probable cause.

a danger to the deputies.[7] Therefore, the sole justification of the *Terry* search, protection of the police officers and others nearby, cannot justify the search in this case.

The state does not contend that the search can be justified by reference to other exceptions to the warrant requirement.[8] We hold, therefore, that the deputies' search of the vehicle was proscribed by the Fourth Amendment to the United States Constitution and art 1, § 11 of the Michigan Constitution. The evidence obtained pursuant to the unconstitutional search should have been suppressed.

There remains the question of the validity of the search of the trunk. The people seek to justify the warrantless search either as an inventory search or as a search incident to arrest.

The search of the trunk occurred subsequent to the deputies' decisions to arrest the defendant for possession of marijuana and to impound the car. The defendant's arrest was based on evidence obtained by unlawful police action. We find that the evidence of marijuana found in the trunk was the "fruit" of that illegality which should have been sup-

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[7]

See *Government of the Canal Zone* v *Bender*, 573 F2d 1329 (CA 5, 1978), a case involving similar circumstances.

[8]

In *People* v *Reed*, 393 Mich 342, 362; 224 NW2d 867 (1975), we stated:

> "A warrantless search and seizure is unreasonable per se and violates the Fourth Amendment of the United States Constitution and art 1, § 11 of the state constitution unless shown to be within one of the exceptions to the rule. * * * The burden is always on the state to show such an exception exists." (Citations omitted.)

pressed. *Wong Sun* v *United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963).

The defendant's conviction is reversed.

Thomas Giles Kavanagh /s/
G. Mennen Williams /s/
John W. Fitzgerald /s/
James L. Ryan /s/
Charles L. Levin /s/

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v DAVID KERK LONG, Defendant-Appellant.	No. 64416

BEFORE THE ENTIRE BENCH

M. S. COLEMAN, C. J. (Dissenting)

We respectfully dissent. The search of defendant's vehicle and the seizure of the controlled substance did not violate the constitutional prohibitions against unreasonable searches and seizures, US Const, Am IV, Const 1963, art 1, §11.

The facts are stated in the majority opinion. The majority opinion concludes that the officer's actions in examining the interior of the vehicle constituted a warrantless search not authorized by *Terry* v *Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). We agree that this issue is governed by the principles recognized in *Terry*.

I

In *Terry*, the Court upheld an officer's actions in "patting down" or "frisking" a suspect's outer clothing during an investigatory stop as a reasonable protective search. The Court stated:

> "Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant.
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> • • •
>
> "The distinctions of classical 'stop-and-frisk' theory thus serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.
>
> "In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' • • •.
>
> • • •
>
> "We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.
>
> • • •
>
> "We must still consider, however, the nature and quality of the intrusion on individual rights which must be accepted if police officers are to be conceded the right

to search for weapons in situations where probable cause to arrest for crime is lacking. Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.

• • •

"Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry, supra,* 16-27.

In *Adams* v *Williams,* 407 US 143, 146; 92 S Ct 1921; 32 L Ed 2d 612 (1972), the Supreme Court explained the role of a protective search, stating:

"The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law. So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose."

II

The majority begins the analysis with the premise that *Terry* authorizes only a limited "pat-down" search of a person and not the search of an area. Without addressing the outer limits of the *Terry* rationale, we reject this distinction as unpersuasive. The opinion in *Terry* authorized the frisking of an overcoat worn by defendant because that was the issue presented by the facts. One could reasonably conclude that a different result would not have been constitutionally required if the overcoat had been carried, folded over the forearm, rather than worn.[1] The constitutional principles stated in *Terry* would still control.

III

The majority also concludes that the protective search rationale could not apply in this case because when defendant was standing next to the deputy at the rear of the vehicle, any weapon which may have been inside the car was out of the reach of the defendant and presented no danger, see *Government of the Canal Zone v Bender*, 573 F2d 1329 (CA 5, 1978).

Other courts have upheld protective searches of the interior of a vehicle while the occupants were detained outside the vehicle. Emphasizing that the occupants were not under arrest at the time of the search and could have returned to the vehicle when the encounter with the officers ended, courts have upheld such protective searches, see *United States* v *Wilkerson*, 194 US App DC 393; 598 F2d 621 (1978), *United States* v *Powless*, 546 F2d 792 (CA 8, 1977), *cert den* 430 US 910; 97 S Ct 1185; 51 L Ed 2d 588 (1977), *United States* v

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[1] See *Bromwell* v *State*, 427 A2d 884 (Del, 1981), and the cases cited below.

Thomas, 314 A2d 464 (DC App, 1974), *United States* v *Green*, 151 US App DC 35; 465 F2d 620 (1972), *Brown* v *State*, 358 So 2d 596 (Fla App, 1978), *State* v *Darling*, 393 A2d 530 (Me, 1978), *Commonwealth* v *Almeida*, 373 Mass 266; 366 NE2d 756 (1977), *State* v *Gilchrist*, ... Minn ....; 299 NW2d 913 (1980), *State* v *Brown*, 160 NJ Super 227; 389 A2d 507 (1978), see also *Uptegraft* v *State*, 621 P2d 5 (Alas, 1980), *Williams* v *State*, 19 Md App 204; 310 A2d 533 (1973).

In contrast to the cases cited, the defendant in this case had an opportunity to enter his vehicle not only after the encounter ended, but also while it continued. Defendant was in the process of entering the vehicle to retrieve his registration records when the officer observed the knife on the floorboard. Defendant's entry into the vehicle would have permitted him to gain possession of any readily accessible weapons in the vehicle. Accordingly, we cannot summarily reject plaintiff's claim that *Terry* authorizes a protective search of the vehicle on the basis that no possible danger was present. If the possibility that a suspect will re-enter his vehicle after an encounter ends is sufficient to support a *Terry* protective search, the fact that he is attempting to enter the vehicle while the confrontation continues is also sufficient.

IV

Therefore, the Court must determine whether the justifications for a *Terry* search, the protection of the officers and others, justifies the officer's actions.

In the instant case, the officers were confronting a traffic offense suspect whose car ended up in a ditch. After meeting the deputies at the rear of his car, defendant failed to respond to their questions. Finally, defendant began walking back toward his driver's door. The defendant appeared to be under the influence of something and acted scared. Approaching the open door, the officer saw a knife on the floorboard.

These observations gave the officers reason to believe they were dealing with an armed and dangerous person. A reasonably prudent officer would be warranted in believing that he was in danger. Therefore, the officer was permitted to conduct a *Terry* search.

After picking up the knife, one officer shone his flashlight at the interior of the vehicle.[2] He saw a leather pouch under the driver's armrest large enough to hold a weapon. He raised the armrest and observed an open leather pouch containing a plastic bag of marijuana.

Considering all the circumstances, including that one weapon had already been found and that the leather pouch was large enough to hold another, the officer could have reasonably concluded that safety required further investigation. The lifting of the armrest was an action reasonably designed to uncover a hidden weapon. This action would permit the officer to investigate further by observing whether the contents of the pouch could be inferred from its outward appearance (for example, a gun case or holster), see *Arkansas* v *Sanders*, 442 US 753, 764-765, fn 13; 99 S Ct 2586; 61 L Ed 2d 235 (1979), or by patting down or frisking the pouch.

The lifting of the armrest is similar to an officer's conduct in feeling under a seat or dashboard or lifting a rug. These actions have been upheld in a variety of cases when conducted as a protective search, see *Wilkerson, supra, Powless, supra, Thomas, supra, Green, supra, Brown, supra, Darling, supra, Almeida, supra, Gilchrist, supra.* Without determining the constitutionality of all these actions in every case, because such issues are not present in this case, the cases cited support

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[2]

Defendant does not argue that this action was an unconstitutional search, see *People* v *Whalen*, 390 Mich 672; 213 NW2d 116 (1973).

the conclusion that, on the facts of the instant case, the officer was warranted in believing that safety required that the armrest be lifted.

In contrast to the gravity of the dangers confronting the officers, the raising of the armrest was a minimal intrusion into defendant's legitimate expectation of privacy. The area underneath an armrest is not a residence or a common repository for personal effects referred to in *Sanders, supra.* Rather, it is part of an automobile with "the diminished expectation of privacy which surrounds the automobile", *Robbins* v *California,* .... US ....; 101 S Ct 2841; 69 L Ed 2d 744 (1981) (Opinion of Stewart, J.), *United States* v *Chadwick,* 433 US 1, 12-13; 97 S Ct 2476; 53 L Ed 2d 538 (1977).

While upholding the constitutionality of a frisk as a protective search, the Supreme Court recognized that

> "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security and it must surely be an annoying, frightening and perhaps humiliating experience." *Terry, supra,* 24-25.

We conclude that the lifting of the armrest was a minimal intrusion into defendant's privacy compared to the intrusions upheld in *Terry.* The raising of the armrest as a protective search in this case was not an unreasonable search prohibited by US Const, Am IV, Const 1963, art 1, § 11.

Once the armrest was lifted, the contents of the open pouch, a plastic bag containing marijuana, were in the plain view of the officer. The officer properly seized the contraband and arrested defendant, *Harris* v *United States,* 390 US 234; 88 S Ct 992; 19 L Ed 2d 1067 (1968).

A review of the other issues raised by defendant discloses no reversible error, see *South Dakota* v *Opperman*, 428 US 364; 96 S Ct 3092; 49 L Ed 2d 1000 (1976).

Mary S. Coleman /s/

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v DAVID KERK LONG, Defendant-Appellant.	No. 64416

BEFORE THE ENTIRE BENCH

BLAIR MOODY. JR., J. (Concurring in result)

I concur with the result reached by the majority opinion. However, in contrast to my brothers, I agree in general with the analysis formulated in the opinion of Chief Justice Coleman, with the exception of the last paragraph. The marijuana found on the front seat of the automobile was legally seized, whereas the marijuana discovered in the trunk was unlawfully obtained.

The defendant was in the process of going into the interior of the automobile in search of the registration and insurance certificates requested by an investigating officer. At that point

the officer saw a knife that was in "plain view". It was the initial discovery of the knife that reasonably led the officers to conduct the *Terry*[1] search of the person.

Thereafter, it was reasonably appropriate and entirely consistent with the principles announced in *Terry* for the officer to conduct a brief search of the interior of the automobile for weapons, limited to areas in which a weapon could be concealed, yet accessible. The officer testified that he looked for another weapon. The contemporaneous search of the interior of the automobile, under the facts of this case, was confined in scope reasonably designed to discover additional hidden instruments for potential assault upon the police officers. Otherwise, the officers might be endangered if the occupant was permitted to re-enter the vehicle to gather requested information or to drive away at a later point. The initial discovery of the knife provided sufficient cause to permit the reasonable search for additional weapons.

Accordingly, discovery of the marijuana, visible under the driver's armrest on the front seat of the car, gave probable cause for an arrest and was properly introduced into evidence.

However, a different question is presented regarding the marijuana discovered in the trunk of the car. The prosecution limits it argument to the effect that the marijuana discovered in the trunk of the car was validly seized pursuant to a proper inventory search following defendant's arrest and a deputy's

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[1] *Terry* v *Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

decision to impound the subject vehicle.[2] Relying upon *South Dakota* v *Opperman*, 428 US 364; 96 S Ct 3092; 49 L Ed 2d 1000 (1976), the prosecution contends that "[w]arrantless inventory searches of impounded cars are a proper caretaking function of the police".

Yet, *Opperman* and the instant case involve clearly distinguishable fact situations. Accordingly, the reasoning set forth in *Opperman* does not apply. Therefore, the search of the trunk in the instant case was unreasonable and violated the Fourth Amendment to the United States Constitution.

In *Opperman*, defendant's illegally parked car was towed to a city impound lot where a police officer observed a watch on the car's dashboard and other items of personal property located in the passenger area of the car. These items were visible from outside the car. A police officer inventoried the contents of the automobile using a standard inventory form pursuant to standard procedures of the local police department. Marijuana was found in the unlocked glove compartment. The impound lot in question had been the scene of thefts of items from cars and testimony revealed that it was "the old county highway yard. It ha[d] a wooden fence partially around part of it, and kind of a dilapidated wire fence, a makeshift fence". 428 US 366 fn 1. Neither the owner nor

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[2]

Plaintiff, in a brief footnote, concludes that the search of a trunk may have *arguably* been a search incident to defendant's arrest. We decline to rule on that question as the argument is not relied upon or developed in this case. Nor does the plaintiff rely upon the "automobile exception" to the warrant requirement in order to justify the search of the trunk. *Cf. United States* v *Ross*, ... US .....; ..... S Ct .....; ..... L Ed 2d .....; 50 USLW 4580 (1982) (search of closed container in automobile). Furthermore, *Ross* and the "automobile exception" do not address inventory searches. *Id.*, 50 USLW 4583, fn 11.

We assume for the purpose of discussion that the decision to impound the automobile was proper in this case.

anyone else was present when the decision was made to impound the vehicle. The locked trunk of the vehicle was not searched.[3]

The plurality opinion in *Opperman* concluded that an inventory search without a warrant was not "unreasonable" and did not violate the United States Constitution.[4] That opinion emphasized that the owner was not present to make other arrangements for the safekeeping of his property. Items of personal property were visible from the outside of the car. Furthermore, this was a routine administrative caretaking function performed pursuant to standard departmental procedures at the impound lot.

The concurring opinion of Justice Powell emphasized that "the search here was limited to an inventory of the unoccupied automobile and was conducted strictly in accord with the regulations of the Vermillion [South Dakota] Police Depart-

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[3]

In the instant case the unlocked trunk was searched. In *Opperman*, the unlocked glove box was searched, but not the locked trunk. The fact that a trunk was searched in the instant case does not by itself suggest an unreasonable search. It could be argued that it is more reasonable to inventory an unlocked trunk than a locked trunk.

[4]

US Const, Am IV provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

A number of courts have interpreted the search and seizure provisions of state constitutions in a more restrictive manner and have refused to permit various inventory searches. *E.g.*, *State* v *Opperman*, 247 NW2d 673 (SD, 1976), and *State* v *Sawyer*, 174 Mont 512; 571 P2d 1131 (1977) (inventory search restricted to safe-guarding articles in plain view), *Miller* v *State*, 403 So 2d 1307 (Fla, 1981) (advice must be given to owner or possessor, if present, that vehicle will be impounded unless such person provides a reasonable alternative).

ment". 428 US 380. Justice Powell agreed that the constitution permits routine inventory searches. As he observed, "[i]nventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized." 428 US 383. "Upholding searches of this type provides no general license for the police to examine all the contents of such automobiles." 428 US 380. In concluding that a warrant was unnecessary, he also noted that in the inventory search context the owner or occupant of the vehicle is not present, nor is there usually any real likelihood that he could be located within a reasonable period of time. Thus, according to Justice Powell, the concerns which prompted the Supreme Court of the United States to require a warrant in the context of other administrative searches[5] are absent. Furthermore, and "[m]ore importantly, no significant discretion is placed in the hands of the individual officer". 428 US 384.

The apparent difference between these opinions in *Opperman* is that the plurality opinion determines that a true inventory search is not "unreasonable" and thus is constitutionally permissible. The warrant clause[6] is not implicated by this analysis. In contrast, Justice Powell concludes that the dictates of the warrant clause must be considered to determine whether a search is reasonable. In most all cases, he notes, a search without a valid consent is unreasonable unless authorized by a search warrant.

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[5]

See, *e.g.*, *Camara* v *San Francisco Municipal Court*, 387 US 523; 87 S Ct 1727; 18 L Ed 2d 930 (1967).

[6]

See fn 4.

In comparing the facts in *Opperman* and those in the instant case, significant differences emerge. In the instant case, an occupant of the car was present at the time of the asserted impoundment. He was not asked whether he wished the car to be inventoried.[7] The impound lot in the case at bar was the underground garage of the sherriff's department. The car was secured at this well-protected site. This was a far different type of lot than the one involved in *Opperman* and suggests that an inventory search conducted at the scene of the arrest or at a well-protected lot is not as reasonable in the instant situation since the car would have been secure in any event.[8]

Most importantly, no standard departmental policy was followed, and no inventory form was introduced. Although the officer testified as to his personal "standard" procedure, this procedure does not meet the requirements of reasonableness as suggested in *Opperman*. A standard departmental practice gives some assurance that the particular vehicle or part of the vehicle was not singled out for a search based upon an

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[7]

The dissenting opinion of Justice Marshall in *Opperman* would require police officers under the facts presented to reach the owner and obtain consent for a search. If specific cause requires a search to preserve the integrity of particular valuable property, no search could be performed absent explicit consent for the search or an attempt to get such consent. 428 US 393-394. The plurality opinion rejects this consent theory. 428 US 376, fn 10. In *Opperman*, unlike the instant case, no one was readily available to give consent.

[8]

The car was so secure in the garage that the marijuana was left in the unlocked trunk overnight. The marijuana was in the control of the officers until it reached the garage since the officers followed the wrecker as it towed the vehicle to the garage.

improper motive.[9] Without a department policy, too much discretion is placed in the hands of a police officer. His decision to search may be an arbitrary one.

Whether the *Opperman* rationale or a more restrictive interpretation of the Michigan Constitution is to be adopted by this Court is left for future determination. Nevertheless, as one commentator concluded after reviewing *Opperman:*

> "What is needed in the vehicle inventory context, then, • • • is not probable cause but rather a regularized set of procedures which adequately guard against arbitrariness.
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> • • •
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> "Inventories should not be upheld under *Opperman* unless the government shows that there exists an established reasonable procedure for safeguarding impounded vehicles and their contents and that the challenged police activity was essentially in conformance with that procedure. This means that a purported inventory should be held unlawful when it is not shown, 'for [instance], that standard inventory forms were completed and kept for future reference (showing presence or absence of valuables), nor that a place of safekeeping for valuables so secured was maintained.'" 2 LaFave, Search and Seizure, § 7.4, pp 576-577, quoting *State* v *Jewell*, 338 So 2d 633, 639 (La, 1976).

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[9]

As to motive, the Court of Appeals opinion states:

> "Deputy Howell testified that his inspection of the vehicle's trunk was motivated by a belief that discovery of the plastic bag of marijuana inside the car suggested the possibility of additional marijuana in the trunk, and because it was his policy to check for valuables to protect himself against subsequent claims by the vehicle's owner." *People* v *Long*, 94 Mich App 338, 348; 288 NW2d 629 (1979).

Accordingly, the procedures followed in this case fail even to measure up to *Opperman's* requirements.

For the foregoing reasons, the marijuana that was found in the trunk should not have been admitted into evidence at trial. The error was not harmless. Accordingly, I agree with the result reached by the majority opinion that the decision of the Court of Appeals must be reversed.

Blair Moody, Jr. /s/

APPENDIX "B"

STATE OF MICHIGAN
COURT OF APPEALS

DEC 18, 1979

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v DAVID KERK LONG, Defendant-Appellant.	No. 78-3810

BEFORE: W. P. Cynar, P.J., and D. F. Walsh and L. B. Bebeau, JJ.

L. B. BEBEAU, J.

Defendant on August 29, 1978 was convicted by jury of possession of marijuana, contrary to MCL 335.341(4)(d); MSA 18.1070(41)(4)(d). He appeals of right from his conviction and September 15, 1978 sentence of two years probation, a fine of $750.00, and court costs of $300.00.

Defendant first contends that marijuana confiscated by law enforcement officers from the interior and the trunk of the automobile he was driving was obtained via an unconstitutional search. The trial court, relying upon the testimony contained in the preliminary examination transcript, denied defendant's pretrial motion to suppress the marijuana evidence, and again denied defendant's motion when it was renewed at trial. Because of the close question presented by the case at bar, and because search and seizure questions such as this one are invariably factually oriented, it is necessary to review in some detail the events which culminated in police seizure of marijuana from defendant's vehicle, as these events are

depicted in the preliminary examination transcript upon which the trial judge relied in denying defendant's motion to suppress.

At approximately 12:05 a.m. on August 25, 1977 deputies Howell and Lewis of the Barry County Sheriff's Department, while on routine patrol, observed a car pass them traveling in the opposite direction, and measured the speed of this vehicle at 71 miles per hour in a 55-mile-per-hour zone. By the time the deputies had turned their vehicle around and driven a short distance they came upon the sought-for automobile with its front end in the ditch and its rear end protruding onto the road. As deputies Howell and Lewis left their vehicle and walked forward, defendant—the driver and sole occupant of the other car—exited from the driver's seat, leaving the driver's door open and the dome light on, and met the deputies at the trunk area of his automobile.

Defendant, after failing to respond to the deputies' initial request for his driver's license, produced it following their second request. When asked for his proof of insurance and vehicle registration defendant again made no response and, subsequent to the deputies' second request, began walking toward his open car door. At this juncture Deputy Howell observed a "large folding knife" lying on the front floor of the vehicle and ordered defendant to halt. While Lewis retrieved the knife, Howell conducted a pat-down search of defendant which revealed no weapons on defendant's person. Deputy Howell then shined his flashlight into the front seat of defendant's car "looking for another weapon." After noticing some object which appeared to be leather protruding from under the center front seat armrest closest to the driver's side of the automobile, Howell reached in, lifted the armrest, and observed an open leather pouch containing a small plastic bag of what appeared to the deputy to be marijuana.

After removing the pouch from the vehicle and showing it to Deputy Lewis, Howell placed defendant under arrest for possession of marijuana, searched the vehicle for additional contraband, searched the glove compartment in vain for the automobile's registration certificate, decided the car would have to be impounded, and thereupon asked defendant if he had a trunk key, to which defendant responded negatively. At the preliminary examination, Deputy Howell testified as follows regarding what then transpired:

"A • • • My intention at the time when I got out of the vehicle and I asked him for the keys. I knew we would have to have the keys to remove the vehicle. The steering column locks and locked ignition, steering and transmission. After receiving the key from him I walked to the rear of the vehicle and noticed that the trunk lock had been punched out. At this time I took my pocket knife and reached in and unlatched the latch.

"Q Why did you do that?

"A It was unusual circumstances to me. Also we check the vehicle to make sure there's nothing, you know, that's valuable.

"Q And you do that in limited circumstances where there is no other person to drive the vehicle away?

"A Yes sir.

"Q Is that standard policy?

"A It's my policy, yes.

"THE COURT: What's your policy? • • • .

"MR. HOWELL: Yes sir, we don't—I think what the Prosecutor is getting at is an inventory search. We do not have an inventory search.

"THE COURT: Alright so you opened the trunk?

"MR. HOWELL: Personally, well I can't speak for the other officers, myself I check the vehicle to make sure there's nothing of value in there that can be later claimed—

"THE COURT: Alright, fine, but why did you open the trunk?

"MR HOWELL: Number one, because I already found marijuana, suspected marijuana in the interior of the car, there may have been more in the trunk. Secondly I check them for valuables. I do."

Upon opening the trunk Deputy Howell observed two large paper bags, each of which was split open to reveal its contents to Howell as marijuana. The total weight of both bags was testified to at trial as between 70 and 75 pounds. Defense counsel at trial introduced into evidence a certificate of title and a copy of an application for certificate of title, as well as an application for 1977 license plates, all relating to the automobile which defendant was driving at the time in question, and all of which facially showed title to the car in a person other than defendant.

Because evidence of both the small plastic bag of marijuana found inside the car and the large volume of marijuana confiscated from the vehicle's trunk was introduced at defendant's trial, and because evidence of marijuana from both these sources is inextricably intertwined as a basis for the jury's undifferentiated verdict finding defendant guilty of possession of marijuana, we deem it necessary to analyze *seriatim* defendant's properly-preserved objections to the admissibility of each portion of marijuana.

I.

As is conceded by the parties and verified by a careful examination of the instant record, the constitutionality of Deputy Howell's discovery and seizure of the small plastic bag of marijuana under the frontseat armrest depends upon the proper analysis of the instant facts in light of the legal principles enunciated by the United States Supreme Court in *Terry* v *Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 889 (1968). The salient question presented for our resolution is whether, under the unique facts and circumstances of the present case, Deputy Howell's precautionary lifting of the frontseat armrest prior to allowing defendant to reenter his automobile was constitutionally valid as a protective search under the *Terry* doctrine. We answer this question in the affirmative and therefore affirm the trial judge's denial of defendant's motion to suppress the small plastic bag of marijuana.

In the case at bar, sheriff's deputies confronted defendant in the early hours of the morning after he emerged from his ditched vehicle shortly after having passed the deputies at a clocked speed of 71 miles per hour. Defendant had to be asked twice to produce his driver's license before he did so. Likewise, it was not until the deputies' second request for his automobile registration and proof of insurance that defendant turned and began walking toward the open door of his vehicle. Defendant's conduct at the scene created the impression in Deputy Howell's mind that defendant "appeared to be under the influence of something."

Rendering the situation more ominous was the deputies' discovery of a large folded knife on the floor in the driver's area of the vehicle. Although a pat-down search of defendant revealed him to be free of weapons, that finding does not answer the critical question involved in this case. Implicit in defendant's turning and walking toward the driver's seat of

his vehicle was the logical inference that it was his intent to reenter the driver's seat to obtain the papers requested by deputies Howell and Lewis. A large folded knife had just been recovered from the floor of the driver's area, and some type of leather-like object was noted partially protruding from under an armrest in that same vicinity. Under such facts we do not believe that the deputies were constitutionally required to allow defendant access to the driver's seat of his automobile without first taking the protective precaution of lifting the nearby armrest to ensure that no weapon was readily available there to defendant's grasp. Deputy Howell testified at the preliminary examination that if he had not found anything he would have asked defendant to get the registration. There is no evidence of a fullscale search of the automobile's interior conducted by sheriff's deputies at this point in time. Rather, the carefully circumscribed intrusion engaged in by Deputy Howell was within the ambit of the *Terry* doctrine.

In *People* v *Ridgeway*, 74 Mich App 306; 253 NW2d 743 (1977), the passenger of a stopped automobile, while standing outside the vehicle, indicated to police officers that his identification was in a closed purse inside the car. One officer removed the purse from the automobile, opened it before giving it to the passenger because the officer did not know what was in it, and discovered a pistol. In approving the search of the purse and seizure of the weapon, this Court stated:

> "• • • [W]ithout reference to the arrest, we would hold that the gun was discovered during a protective frisk as approved by *Terry* v *Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). A possible objection to either holding would be that the gun was inside the car and thus not within the defendant's immediate reach. But the officers still had not seen the defendant's identification. Whether viewed as incident to an arrest or as part

> of a continuing on-the-scene investigation of suspicious conduct, someone was going to open the purse and produce the identification. Given the circumstances of this case, we do not believe that the officers were required to allow the defendant access to the purse without first checking the contents. A number of Federal decisions involving similar circumstances support our conclusion. *United States* v *Murrie*, 534 F2d 695 (CA 6, 1976), *United States* v *Poms*, 484 F2d 919 (CA 4, 1973), *United States* v *Beasley*, 479 F2d 1124 (CA 5, 1973), and *United States* v *Vigo*, 487 F2d 295 (CA 2, 1973)." 74 Mich App at 314-315.

See also *People* v *White*, 84 Mich App 351; 269 NW2d 598 (1978). *People* v *Rosales*, 406 Mich 624; 281 NW2d 126 (1979) and *Government of the Canal Zone* v *Bender*, 573 F2d 1329 (CA 5, 1978), relied upon by defendant, are factually distinguishable since in neither case was the search sought to be justified under *Terry* conducted pursuant to a bona fide need to protect police officers from physical danger or fear of violence during their investigation.

We adopt the *Ridgeway* rationale as applicable to the instant facts. "The touchstone of our analysis under the Fourth Amendment is always the 'reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' *Terry* v *Ohio*, 392 US 1, 19; 88 S Ct 1868; 20 L Ed 2d 889 (1968)." *Pennsylvania* v *Mimms*, 434 US 106, 108-109; 98 S Ct 330; 54 L Ed 2d 331 (1977). Under the totality of the facts and circumstances existing in the case at bar, Deputy Howell's lifting of the armrest constituted a reasonable protective search under *Terry*. The trial judge therefore correctly denied defendant's motion to suppress the marijuana discovered under the armrest.

II.

We turn next to a determination of whether Deputy Howell's inspection of the trunk of the stopped vehicle was constitutionally justifiable as an inventory search. In *South Dakota* v *Opperman*, 428 US 364; 96 S Ct 3092; 49 L Ed 2d 1000 (1976), the United States Supreme Court held that US Const, Am IV is not violated by a warrantless inventory search, following standard procedures, of a lawfully-impounded automobile, where the procedure was not a pretext concealing an investigatory police motive, and the inventory was not unreasonable in scope. See also *People* v *Boutell*, 80 Mich App 216; 263 NW2d 36 (1977).

There is no question in this case but that the deputies' decision to impound defendant's vehicle was proper. Defendant, the sole occupant of the automobile, had been arrested for possession of marijuana and was to be transported to jail. The car he was driving was in the ditch, with the rear portion partially blocking the public roadway. Moreover, since the lock had been punched out of the vehicle's trunk, the trunk's contents were accessible to anyone who might happen along in the early hours of the morning with the inclination to trip the latch on the trunk. Impoundment of the vehicle was therefor clearly reasonable. *People v Roberson*, 80 Mich App 241; 263 NW2d 42 (1977).

Nor do we deem controlling the fact that the trunk search occurred at the scene of the stop instead of at the impoundment lot. The testimony in this case is clear that the decision to impound had been made prior to the trunk search, although a wrecker was not summoned to tow the vehicle away until after the trunk was inspected by Deputy Howell. The Court in *Opperman, supra* at 373 declared:

> "In applying the reasonableness standard adopted by the Framers, this Court has consistently sustained police intrusions into automobiles impounded *or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents.*" (Emphasis supplied.)

See also *People* v *Roberson, supra,* which sustained an on-the-scene inventory search.

Deputy Howell testified that his inspection of the vehicle's trunk was motivated by a belief that discovery of the plastic bag of marijuana inside the car suggested the possibility of additional marijuana in the trunk, and because it was his policy to check for valuables to protect himself against subsequent claims by the vehicle's owner. It is well known that a given police action may be supportable on more than one legal ground. See *People* v *Roberson, supra* at 242-243; *People* v *Ridgeway, supr at* 314-315. The fact that Deputy Howell believed that his inspection of the trunk was justifiable on two separate grounds does not compel the conclusion that his second articulated ground was a mere pretext for the accomplishment of a search actually conducted to some other motive. Since the issue was neither briefed nor argued in the present case, we express no opinion as to the legal validity of Howell's belief that he could search the entire car, including the trunk, based upon the finding of the small bag of marijuana under the arrnrest. We note, however, that the legal questions inherent in this theory are sufficiently complex to have recently necessitated the attention of the highest court of a sister state. *Wimberly* v *Superic. Court of San Bernardino County,* 16 Cal 3d 557; 128 Cal Rptr 641; 547 P2d 417 (1976). Deputy Howell's expressed entertainment of two concurrent theories of justification for his inspection of the trunk does not indicate that the inventory basis for the search was a mere pretext.

During his preliminary examination testimony, Deputy Howell stated that "[w]e do not have an inventory search." Howell averred, however, that it was his policy to check a vehicle in an impoundment situation to guard against later claims.

One prerequisite to a valid inventory search recognized by the *Opperman* Court is that the search must be conducted pursuant to a standard police procedure. That the trial judge properly considered any inconsistencies in the deputies' testimony regarding this element is clearly demonstrated by his ruling denying defendant's motion to suppress:

> "The District Judge held that the intrusion into the trunk constituted an inventory search and such was permissible. From my review of the testimony of the officers, and there was testimony to the effect that the examination of the trunk was made for the purpose of determining what valuables were contained in this automobile, and the officers didn't use the chosen words of inventory, but I'm satisfied when the officers said that they're concerned about valuables, that they meant inventory. I'm satisfied that that's why the trunk was opened."

The ruling of the trial court denying defendant's motion to suppress will be reversed on appeal only if it is clearly erroneous. *People* v *Terrell*, 77 Mich App 676; 259 NW2d 187 (1977). Utilizing that standard, we find no reversible error in the trial judge's determination that the deputies' inspection of the trunk was made pursuant to a proper inventory of the type approved by *Opperman* and its progeny.

Defendant's remaining allegations of error are without merit.

Affirmed.

Office - Supreme Court, U.S.
FILED
NOV 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-256

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MICHIGAN,

PETITIONER,

v.

DAVID KERK LONG,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 13, 1982.
CERTIORARI GRANTED OCTOBER 12, 1982.

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DATE	PROCEEDINGS
1977	
Aug. 25,	Complaint Filed
Aug. 25,	Warrant Filed
Aug. 29,	Arraigned — District Court
Sept. 22,	Preliminary Examination
Dec. 28,	Opinion and Order Binding Defendant over for Trial
1978	
Jan. 4,	Information Filed
Jan. 20,	Arraignment — Circuit Court — Not Guilty Plea Entered
Mar. 3,	Motion to Quash and/or Suppress Evidence Filed
Apr. 28,	Defendant's Motion to Suppress and Motion to Quash Denied
Apr. 28,	Peoples Motion for Consolidation Denied in Part
Aug. 28,	Jury Trial Begins
Aug. 29,	Jury Trial Ends — Verdict Entered
Sept. 15,	Sentence: Poss. Controlled Substance-Marijuana Prob. 2 Yrs. Fine $750.00 Costs $300.00 starting 10-15-78 payable $50.00 per month — Appeal Filed
Sept. 22,	Claim of Appeal Filed — Court of Appeals
1979	
Apr. 3,	Appellant's Brief on Appeal Filed
July 20,	Appellee's Brief on Appeal Filed

DATE	PROCEEDINGS
1979	
July 31,	Record Filed
Oct. 2,	Submitted on Case Call
Dec. 18,	Court of Appeals Opinion Filed
1980	
Jan. 7,	Application for Leave to Appeal to Supreme Court Filed
July 15,	Application for Leave to Appeal granted by Supreme Court

MICHIGAN COURT OF APPEALS # 78-3810

01 PEOPLE OF MICHIGAN, Plaintiff 02 LONG DAVID KERK, Defendant	Court of Appeals File No. 78-3810 Lower Ct. No. 78-100 FY

9/22/78	Claim of Appeal
9/15/78	Order Appealed From: Barry County Circuit C Judges: Deming, Hudson E. LCT 78100 FY Possession Marijuana
10/06/78	Steno Certificate R-02295 Goodwin, Annet Date: 10/04/78
1/04/79	Notice of Filing Trans R-02295 Goodwin, Annet Date: 1/03/79
1/31/79	Stip Extnd Time Appt Brf Extend Until: 04/03/79
4/03/79	Appellant Brief
5/11/79	Appearance Atty For Pl
5/14/79	Stip Extnd Time Appe Brf Extend Nntil: 06/11/79
6/08/79	Motn Extend Time Appe Brf
7/16/79	Order Ext Time Appe Brief
7/20/79	Motn Extend Time Appe Brf
7/20/79	Appellee Brief
7/24/79	Noticed for: Oct Record Reqst
7/31/79	Record Filed Lc File & Tr(2)
8/07/79	Order Ext Time Appe Brief
10/02/79	Submitted on Case Call

12/18/79	Opinion Filed
1/07/80	Appl for Leave to Sup Ct Aty: Geary, James H.
1/22/80	Transferred to Sup Crt Lc File; 2-Trans; and Coa File Sent to Supreme Court
7/15/80	S/Ct Order Grant Application
1/06/81	Oral Arguments Held
6/14/82	Supreme Court Opinion Conviction Reversed
7/09/82	Remittitur and Records Returned
7/21/82	File Rtrnd by Sup Crt

(Certification omitted in printing.)

[SEAL]

People of the State of Michigan,

Plaintiff-Appellee,

v

David Kerk Long,

Defendant-Appellant.

(Counsel Deleted)

MICHIGAN SUPREME COURT #64416
APPEAL FROM COURT OF APPEALS #78-3810
COUNTY — BARRY — #78-100-FY

DATE	PROCEEDINGS
1980	
Jan. 7	Application filed.
Jan. 17	Answer and Brief in Opposition to Application filed.
Jan. 25	Court of Appeals & Circuit Court records filed.
July 15	GRANTED, to be heard Jan, 81.
Dec. 1	Motion for permission to file typed briefs filed.
Dec. 12	Motion to expand record filed.
Dec. 16	Motion to file typewritten brief GRANTED.
Dec. 19	Response to motion to expand record filed.
1981	
Jan. 6	Argued and submitted #5.
1982	
June 14	REVERSED.
July 9	Circuit Court and Court of Appeals records returned w/remittitur.

(Certification omitted in printing.)

[SEAL]

COMPLAINT
(Filed: August 25, 1977)

STATE OF MICHIGAN
THE DISTRICT COURT—JUDICIAL DISTRICT
NO. 56—1st Division
County of Barry

THE PEOPLE OF THE STATE OF MICHIGAN vs. DAVID KERK LONG Defendant(s)	Case No. 78-100-FY A-507-77

Date of Offense on or about, to-wit: August 25, 1977
Location Township of Orangeville, Mullen Road
Complainant George Howell
Complaining Witness George Howell

STATE OF MICHIGAN }
County of Barry } ss.

The above-named COMPLAINING WITNESS being duly sworn before the undersigned Judge, Magistrate, or Clerk of the District Court, upon the date indicated below, says that heretofore on the DATE OF OFFENSE listed above, at the LOCATION listed above in the said County, State of Michigan, the above-named Defendant(s),

David Kerk Long of 159 North Park Drive, Grand Rapids, Michigan, did then and there possess with intent to deliver a certain controlled substance, to-wit: Marijuana: Contrary to M.S.A. 18.1070(41)(1)(c).

Punishable by imprisonment in the State Prison for not more than 4 years or by a fine of not more than $2,000.00, or by both such fine and imprisonment.

WARRANT AUTHORIZED BY
(s) GARY R. HOFMAN
Prosecuting Attorney

contrary to the form of the statute in such case made and provided, etc.

WHEREFORE, the said Complainant prays that the said Defendant(s) may be apprehended and held to answer this Complaint and further dealt with in relation to the same, as law and justice may require.

Dated August 25, 1977

Subscribed and Sworn to on this day by
(s) GEORGE HOWELL
Complaining Witness

(s) MARGARET SNYDER
Before the above named
District Judge/Deputy Clerk/ Magistrate

WARRANT
(Filed: August 25, 1977)

STATE OF MICHIGAN
THE DISTRICT COURT—JUDICIAL DISTRICT
NO. 56—1st Division
County of Barry

(Title omitted in printing.)

TO ANY SHERIFF, DEPUTY SHERIFF, COURT OFFICER, STATE POLICE OFFICER, OR POLICE OFFICER.

WHEREAS, the above-named COMPLAINING WITNESS hath this day made and filed a Complaint in the District Court for the said Judicial District alleging that heretofore on the DATE OF OFFENSE listed above, at the LOCATION listed above in said County, State of Michigan, the above-named Defendant(s)

David Kerk Long of 159 North Fark Drive, Grand Rapids, Michigan, did then and there possess with intent to deliver a certain controlled substance, to-wit: Marijuana; Contrary to M.S.A. 18.1070(41)(1)(c).

Punishable by imprisonment in the State Prison for not more than 4 years or by a fine of not more than $2,000.00, or by both such fine and imprisonment.

contrary to the form of the statute in such cases made and provided, etc.

WHEREAS on examination of said sworn COMPLAINT by me, it appears to me that said offense has been committed and there is just cause to suspect that said Defendant(s) are guilty thereof: THEREFORE IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, you and each of you are hereby commanded forthwith to take the said Defendant(s) and bring them before this Court, to be dealth with according to law.

Dated August 26, 1977

(s) JOSEPH L. BAUM
District Judge

(4) DIRECT EXAMINATION

By: Mr. Weller

Q. State your name please?

A. George Howell.

Q. Are you employed?

A. Yes sir.

Q. By whom?

A. Barry County Sheriff's Department.

Q. Were you so employed on August 25th of 1977?

A. Yes sir I was.

Q. What was your shift that evening?

A. Working from eleven o'clock on the 24th until seven a.m. on the 25th.

Q. In regard to this case did anything unusual occur that evening?

A. Yes sir, my partner Deputy Lewis and I were southbound on Norris Road.

Q. Approximately what time was this?

A. That was approximately twelve o five a.m. on the 25th.

Q. Continue.

A. We were southbound on Norris Road on the way to a complaint. We were south of Keller Road approximately a third to a half a mile. We met an oncoming car coming towards

us. We had moving radar. Tripped the radar at seventy-one miles an hour. At this time I turned around, went after the vehicle. The vehicle I believed to be the same one that tripped the radar made a left turn headed west on Mullin Road. After it (5) turned west on Mullin Road approximately a hundred and fifty feet, something like that, a short ways down the road, the front end of the car went into the north ditch. The car ended up broadside in the road. The car was facing north with the front end of the car in the ditch.

Q. What did you do then?

A. At this time we pulled up to the vehicle, had our lights on, both my partner and I exited our vehicle, walked to the Defendant's vehicle. Defendant in the meantime had exited his vehicle and walked to the rear of his car.

Q. How did he leave his vehicle?

A. He got out and walked back to the back of the vehicle.

Q. Alright, what happened then?

A. He did not say anything at all. I asked him twice to produce his driver's license. After asking him the second time to produce his driver's license, he produced his driver's license. I then asked him twice for his registration and proof of insurance. After asking him the second time, he started to walk towards the driver's door of the vehicle.

Q. Alright if you will hold it just a second. Is the gentleman that you stopped that evening present in Court today?

A. Yes sir, he's the gentleman with glasses on and the tan suit on.

MR. WELLER: Let the record reflect that he has identified the Defendant, David Kirk Long.

Q. Alright now you were relating that he met you and he was starting back to his vehicle?

(6) A. Yes sir that is correct. I was behind him and my partner was to the Defendant's left. The door of the vehicle was open, interior light was on.

Q. Was that open all the time or what?

A. Yes sir, apparently he didn't close it all the way or he left it open when he got out of the car. The door was open.

Q. How much?

A. All the way.

Q. All the way, alright.

A. As we were walking up we got to approximately the area of the rear tire of the car, I saw a large folding knife laying on the floor board near the outward edge of the seat. At this time I stated Hold it. I don't remember if he just stopped or if I put my hand on his arm, anyway he stopped and my partner picked up the knife. I told Mr. Long to put his hands on the roof of the car which he did.

Q. What was your purpose in doing this?

A. Well there was a large folding knife on the floor. He had not said anything to us and I frisked him for weapons.

Q. You were searching for weapons?

A. Yes sir I frisked him.

Q. Alright, what next occurred?

A. Okay, after I frisked him I walked up to the door of the car looking for another weapon. I shined my light into the car. There was arm rests—the front seat of the vehicle was equipped with arm rests. I saw something that appeared to be under the arm rest. At this time I kneeled in the vehicle and (7) I lifted the arm rest. There was a leather pouch, it appeared to be like a long folded wallet, folded in half, it wasn't what you would call a wallet but it appeared something like that. It was laying underneath the arm rest, I lifted the arm rest, it was open and the—

Q. Now the arm rest wasn't open but you say this leather pouch or whatever was open?

A. Yes sir, the arm rest was down, when I lifted the arm rest—folded the arm rest up the pouch was open. It was unfolded and it was on the—would be towards the passenger's side of the vehicle. In that compartment there was a plastic baggie and as I kneeled in the car I shined the flashlight on it and it appeared to me to be marijuana in the plastic baggie.

THE COURT: That wasn't in the pouch, that was separate from the pouch?

MR. HOWELL: No sir, it was in the pouch but part of it was sticking out of the pouch. At this time I picked it up and I got back out of the vehicle. I took the baggie—well I picked it up and I could feel something else inside of it. I didn't know what it was. I removed the baggie. The object I felt in there was a glass bottle, small glass bottle with a screw on top. There was a white substance in there and one compartment on the other side of the pouch there was two pieces of paper. There was a piece of tinfoil and it had a

white pill in there wrapped in the tinfoil. At this time I put it in my back pocket and I says you're under (8) arrest. I then searched the car for anymore suspected narcotics and also checked the glove box for registration for the vehicle.

Q. Was the registration ever produced?

A. No sir, there was no registration for the vehicle we had stopped. There was a registration containing the Defendant's name and for a Buick and it was a different license number than the vehicle I had stopped. I did not remember the particular license number of the vehicle we had stopped but I knew the letters were different. There was also title in there for a Mercury.

Q. Was that the kind of car you stopped?

A. Yes sir, it was a seventy-two Mercury. In later checking it was the same VIN number but I noticed that the title was in the name of a William Brake and an address of Kalamazoo.

• • •

Q. Then you said you placed the subject under arrest?

A. Yes sir, after I examined I placed him under arrest.

Q. On what charge?

A. Possession of marijuana.

Q. Alright, what happened next?

(9) A. After checking the interior of the car, as I was getting out of the vehicle I noticed the keys weren't in the ignition. The vehicle was going to have to be towed away, there was nobody else to drive it and he was under arrest. The vehicle was sitting cross ways in the road. As I exited the

vehicle Mr. Long was still standing beside the car. I asked him for the keys for the vehicle so he produced a single key with no key ring or anything else. At the time I asked him if he had any trunk keys or anything else because it seemed unusual just a single key along with what I already related. He stated no, I don't have one.

Q. You indicated earlier you felt the need to call a wrecker in this particular incident?

A. Yes sir that is correct.

Q. Is that standard policy for your department?

A. Yes, well our policy is when we place somebody under arrest, if either there's nobody else in the car to drive it or the subject we are arresting owns a car and he doesn't want another occupant to drive it, we have it towed away because we have taken him away from his vehicle and there's certain responsibility there. We also check the vehicle to make sure there's nothing valuable that can later be claimed to be stolen.

Q. Alright pursuant to that—

A. Pursuant to having the vehicle removed from his possession, yes.

Q. You say you placed the subject under arrest and he was (10) alone?

A. Yes sir that is correct.

Q. And that caused you to summon a wrecker?

A. Yes sir I later did, yes. My intention at the time when I got out of the vehicle and I asked him for the keys I knew we would have to have the keys to remove the vehicle. The steering column locks and locked ignition, steering and trans-

mission. After receiving the key from him I walked to the rear of the vehicle and noticed that the trunk lock had been punched out. At this time I took my pocket knife and reached in and unlatched the latch.

Q. Why did you do that?

A. It was unusual circumstances to me. Also we check the vehicle to make sure there's nothing, you know, that's valuable.

Q. And you do that in limited circumstances where there is no other person to drive the vehicle away?

A. Yes sir.

Q. Is that standard policy?

A. It's my policy, yes.

THE COURT: What's your policy? I kind of missed that when a truck went by.

MR. HOWELL: Yes sir, we don't—I think what the Prosecutor is getting at is an inventory search. We do not have an inventory search.

THE COURT: Alright so you opened the trunk?

MR. HOWELL: Personally, well I can't speak for the other officers, myself I check the vehicle to make sure (11) there's nothing of value in there that can be later claimed—

THE COURT: Alright, fine, but why did you open the trunk?

MR. HOWELL: Number one, because I already found marijuana, suspected marijuana in the interior of the car, there may have been more in the trunk. Secondly I check them for valuables. I do.

Q. What, if anything, did you find when you opened the trunk?

A. Yes sir I—

MR. JERKINS: I'm going to object to all of this as objectionable as a result of an illegal search.

MR. WELLER: I don't think it's an illegal search, your Honor, I think it's an inventory search that has been approved of and in fact that's exactly what this was.

MR. JERKINS: He's already testified it was not an inventory search.

MR. WELLER: Yes, he said that—

THE COURT: Well let's not argue here. He has objected and number one he said I searched the trunk because he had already found marijuana in the car and number two he looked to see if there were any valuables in the car, is that correct?

MR. HOWELL: Yes sir it is.

THE COURT: Alright and you objected?

MR. JERKINS: That's correct.

THE COURT: Now Mr. Weller?

(12) Q. What did you find in the trunk?

THE COURT: Well just a minute.

MR. WELLER: I think this was a valid inventory search, however the officer wants to term it. The car was being impounded and the officers have a Court approved right to this type of search when they are empounding a vehicle .

THE COURT: Mr. Jerkins?

MR. JERKINS: Your Honor, if he wants to search that particular trunk he should attempt to get a search warrant to search that trunk. Because he may in his opinion and we haven't had a chance to get cross examination have found some small quantity of what he suspects to be marijuana in no way indicates that there is marijuana in the trunk and if there's any valuables in the trunk and there's no lock on it, I submit that that doesn't follow. He didn't even make inquiry of Mr. Long if there were any valuables in there and certainly as far as protection of themselves, all they had to do was get a statement from Mr. Long that there's no valuables in there and that there's no lock in there, there is no necessity to go into that trunk.

THE COURT: There's got to be some law on this, isn't there?

MR. JERKINS: Quite a bit of law on this. A lot of law on this.

THE COURT: Let's take a short recess. Can I see you both?

(Court was recessed at 3:25 p.m.)

(13) (Court was reconvened at 3:35 p.m.)

THE COURT: Let the record show I have conferred with counsel in Chambers and I understand this is our agreement. You go ahead with the Examination and then the questions on the search will be determined on briefs later, is that correct?

MR. WELLER: Correct, your Honor.

MR. JERKINS: That's my understanding.

THE COURT: Okay, Mr. Weller?

DIRECT EXAMINATION (Continued)

Q. The last question I believe is what did you find when you opened the trunk?

A. Two large bags having a substance—first of all the two bags had slits in them. They were open so the contents could be seen.

THE COURT: I'm sorry—you found what?

MR. HOWELL: Two large bags in the trunk of the vehicle.

Q. What kind of bags? Plastic or paper?

A. Well, paper and there was like a waterproofing substance over the top of the paper.

Q. How big were they?

A. It appeared approximately like that.

Q. Is that about three feet long?

A. Yes sir, approximately three foot by eighteen inches. In both bags the substance appeared to be marijuana.

Q. At this point what did you then do?

(14) A. The subject was handcuffed, placed in the cruiser, advised of his rights. The wrecker came, they took the vehicle. We followed the wrecker to the sheriff's department around back to our garage. Deputy Lewis went with the vehicle and wrecker and secured it. I took Mr. Long to the security garage, took him in where he was booked by the correction's officer and after the vehicle was secured, tests were run by Deputy Lewis.

Q. Did you cause samples of those substances seized on this occasion to be analysed?

A. Yes sir they were.

Q. Did you receive a report of the analysis?

A. Yes sir we did.

• • •

(16) CROSS EXAMINATION

By Mr. Jerkins:

Q. Officer, how long have you been a deputy sheriff?

A. Deputy Sheriff almont seven years, I had three years with Detroit City Police.

Q. Have you had any specialized training as far as narcotics?

A. Yes sir, when I worked for Detroit we had an in-service training for running field tests on marijuana, cocaine, et cetera.

Q. Alright and that was ten years ago then?

A. Well, probably eight, nine.

Q. I take it then that's the only training you have actually had?

A. Yes sir.

Q. Alright, now on this particular occasion on August 25th, who was driving the cruiser?

A. I was sir.

Q. And it was dark obviously?

A. Yes.

Q. It was past midnight, twelve o five?

A. Yes sir that's correct.

Q. Alright now when this other car went by you that your radar indicated it was doing seventy-one miles per hour, did you notice what type of car it was?

A. No sir, the exact make I did not.

Q. I take it all that really happened was you noticed a car go by and you noticed what the radar indicated?

(17) A. Yes sir, can I relate something?

Q. Go ahead.

A. When a vehicle is coming towards you at night it's hard to tell what they are. Personally I try to, when they go by, get some description of the front end or note something about the vehicle. As it went past me I was applying my brakes I noticed that the tail light on the passenger's side, the outboard part of the tail light was partially broken showing part of the white light.

Q. Alright and that's all you really observed about this particular vehicle?

A. Yes sir, also I thought it was dark green.

Q. Alright, as far as who was driving the vehicle, could you tell if it was a male or female?

A. No sir I could not.

Q. As to how many people in the vehicle, I take it you didn't notice that either?

A. I believe that was one. To the best of my knowledge there was one.

Q. Alright but you could'nt really tell because all of this was happening so fast and the other vehicle was going faster, right?

A. That is correct.

Q. Alright, now you had to go some distance, did you not, before you turned around?

A. As soon as I stopped there was a driveway right there and to the best of my recollection I believe I backed into (18) the driveway and turned around.

Q. How fast were you going by the way?

A. I believe approximately fifty-four miles on hour.

Q. Alright, that's going in the opposite direction?

A. Yes sir, that's correct.

Q. Alright, when you turned around are you telling this Court that the vehicle that went by you was still in sight?

A. Yes sir it was but shortly after turning around there is a curve from the right to the left and it was out of my sight.

Q. Alright and you also indicated that the car apparently made a left turn and went down another road, now you didn't see that left turn, did you?

A. Yes sir I did.

Q. You did see that?

A. Yes.

Q. Did you see the car when it went in the ditch?

A. After it made the left turn there is some trees and brush there. As I was coming up to the intersection it appeared to me that the lights swerved.

Q. Okay, so what you're saying is—

A. It appeared to me the lights weren't going straight anyway.

Q. Alright, I also understand from your testimony you did not see Mr. Long get out of the vehicle, is that correct?

A. Yes sir I did.

Q. You did see him get out of the vehicle?

(19) A. Yes sir.

Q. I thought you said that as you pulled up you saw him by the rear of the trunk?

A. No sir.

Q. You didn't say that? You are saying then you actually saw someone get out of the vehicle?

A. Yes sir, as we pulled up to that vehicle he was sitting in the driver's seat, as we pulled up and turned the overheads on, we got out of our vehicle, he exited his car and he met us by the trunk of his car.

Q. Alright so he was still in the vehicle is what you're telling us now—when you pulled up?

A. Yes sir.

Q. Alright and when you pulled up, you asked him what?

A. I asked him for his driver's license.

Q. And he did furnish that to you, is that correct?

A. Yes sir, I believe I asked him twice.

Q. Alright and then he furnished it to you?

A. Yes sir.

Q. Alright, he was cooperative, was he not?

A. Yes sir.

Q. Didn't give you any hard time, didn't appear beligerent or anything like that?

A. He didn't say a word.

Q. He didn't say a word, alright. If anything then would you say he was rather passive?

A. No sir, I wouldn't say passive.

(20) Q. What would you say? How would you describe him as far as his conduct?

A. He appeared to be under the influence of something.

Q. Okay, anything besides that?

A. You're asking me for opinion, my opinion?

Q. Pardon?

A. In my opinion he acted scared.

Q. He what?

A. I said in my opinion he acted scared.

Q. He acted scared? Well, don't most people when they are stopped by a police officer at twelve o five act a little nervous and scared?

A. No sir.

Q. You don't think so?

A. No sir.

Q. I see, you've never had that experience I take it?

A. Yes I have at times. Usually they have open intox in the car or something like that.

Q. Now I take it then when you asked for his registration this is when he started walking back towards the car and you were walking back and then you saw something on the floor, is that right?

A. Yes sir, that's correct.

Q. That's when you say you saw this object that appeared to be a knife?

A. Yes sir.

Q. Were other items on the floor?

(21) A. On the driver's side there were some papers and letters on the floor board, yes sir.

Q. Weren't there a lot of tools on the floor?

A. On the front floor board?

Q. Yes.

A. No, there weren't any.

Q. You didn't see any tools? All you saw was some papers and what you thought was a knife, is that what you are telling this Court?

A. Yes sir, I believe there were some tools on the back floorboard.

Q. Some tools on the back floorboard?

A. There may possibly have been, I'm not sure, but there weren't any on the front floorboard.

Q. Well, where was this so-called knife that you're talking about?

A. Best as I can describe it, it was forward—if I can show you—this is the front edge of the seat and this is the outboard part of the seat here, it was by the door, the knife was laying approximately in this area right on the floorboard approximately that far away from the edge of the door on the floorboard.

Q. Well, let me see if I can translate that a little bit for the record. Are you saying that this was on the passenger's side or the driver's side of the front seat?

A. It was on the driver's side.

Q. Okay, by the floorboard you're talking about the floor?

(22) A. Yes sir, near the driver's door.

Q. Alright, near the driver's door?

A. Yes sir.

Q. Okay, and any other tools you didn't see up in that area at all?

A. No sir, I did not.

Q. Where were these other tools that you saw?

A. I said I believe there may possibly have been some on the rear floorboard, I am not really sure.

Q. Behind the driver or behind the passenger?

A. Very possibly there have been some behind the driver.

Q. Alright, would you describe this seat for us so I understand what it is. Is it a flat bench type seat or are they buckets, or what are they?

A. I believe it's what they call a split bench.

Q. Now so we are clear on a split bench, you mean that there are actually two different seats?

A. Yes sir, it's a bench seat but it's divided in the middle.

Q. Alright and when you say it's divided in the middle, what divides it?

A. There's not a console or anything like that if that's what you mean.

Q. Alright, there's no console?

A. No.

Q. Okay, are there arm rests?

A. Yes sir.

Q. Where are these arm rests?

(23) A. In the middle of the seat.

Q. How many arm rests are there?

A. There are two.

Q. Two?

A Right.

Q. Alright, do they fold back into the back part of the seats?

A. That is correct, they fold up and back into the seats.

Q. Okay, so when you want to use the arm rests you have to pull it forward and down, is that right?

A. Yes sir, that is correct.

Q. Alright, in what condition were these arm rests when you approached the vehicle?

A. You mean where were they at?

Q. Where were they located?

A. Down.

Q. Down and when you say down, you mean on the seat?

A. Yes sir.

Q. Okay, now at the time that you saw this what you thought was a knife on the floor, this is when you then stopped Mr. Long and told him hands up against the car or to that effect?

A. Yes sir.

Q. And that's when you searched him?

A. I frisked him.

Q. Alright, you didn't find any weapons, did you?

A. No sir, I did not.

(24) Q. Okay and at this partciular point was he free to leave?

A. Was he free to leave?

Q. Yes, was he free to leave?

A. No I still wanted to talk to him about why the car was in the ditch and also in reference to speeding.

Q. Did you ever talk to him about that?

A. Later on, yes I did.

Q. Later on, alright. He wasn't free to leave I take it?

A. I still wanted to talk to him.

Q. Well, you may have wanted to talk to him but was he free to leave? What if he said I'm leaving?

A. I would say hold up.

Q. Would have stopped him, detained him?

A. He wouldn't have driven the car away, yes I probably would have.

Q. Pardon?

A. In my opinion he was under the influence of something as I stated previously.

Q. Would you, at this particular time, consider him under arrest?

A. Under physical arrest?

Q. Yes.

A. No sir.

THE COURT: Can you speak up a little louder please?

MR. HOWELL: Yes.

A. No sir, not under physical arrest.

(25) Q. Is there another kind of arrest besides physical arrest?

A. Well we were detaining him at that time that would be similar to a traffic stop.

Q. So what you're telling us, if I understand your testimony, is that he was under your control at this point?

A. Yes sir that is correct.

Q. And you weren't going to let him go until you finished whatever it was that you wanted to do?

A. Yes sir, that's correct.

Q. Okay, and in fact when you told him to put his hands up on the car, you expected him to do that, didn't you?

A. Yes sir, that's correct.

Q. What if he wouldn't have done that, what would you have done?

A. I would probably put his hands on the car and checked him.

Q. Okay, so you were—would have forceably made him do it then?

A. Yes sir.

Q. And you did then actually search him at this point?

A. Yes sir, I frisked him.

Q. Alright, you frisked him. Alright, now at that point you have already determined he has no weapons, he's under your control, he's not able to leave cause you aren't going to let him leave, right?

A. Right, he's not handcuffed or anything.

Q. I understand he's not handcuffed but he's under your control?

(26) A. Yes sir.

Q. There are two officers there, is that right?

A. Yes sir there is.

Q. Alright and are you telling us that all you wanted in that car was to find the registration and proof of insurance?

A. Yes sir, that's what I'd asked him for.

Q. Alright, that's what you asked him for. Did he tell you that it was in the glove compartment of the car?

A. No sir.

Q. He didn't? Did he tell you that's where he was going to go to get them?

A. He didn't say anything.

Q. I see, did you ask him where is the registration or where is the proof of insurance?

A. I asked him for it, I didn't ask him where it was.

Q. But you weren't going to let him go to the car, were you, at this point?

A. Not after we saw a knife, no sir.

Q. By the way did you pick up the knife?

A. Yes sir.

Q. Okay, so you knew there was no knife in the car then?

A. We knew we had that knife, yes sir.

Q. Alright, and you didn't know whether or not there was another knife in the car or anything, did you?

A. No sir, I did not.

Q. Alright, you never asked him where in the car is the registration or proof of insurance?

(27) A. No sir.

Q. I see, so at this point I take it then what you do is you proceed then and start searching the car?

A. No sir, I looked in the vehicle. I wasn't looking for the registration.

Q. What were you looking for then when you were looking in the vehicle?

A. To see if there was another weapon in the car.

Q. To see if there was another weapon, I see. Now he was away from the car, wasn't he?

A. Approximately—are you talking about from the open door?

Q. Yea.

A. Approximately two or three feet.

Q. Alright, did your partner have him so that he had him pretty much under control at this point while you are inside the vehicle?

A. He was standing beside him.

Q. Alright so you weren't concerned then about Mr. Long then, were you?

A. I didn't completely ignore him.

Q. No I understand that but you weren't that concerned because you knew your partner was watching him and keeping him under control?

A. No sir I wouldn't say that I was not concerned. I was concerned.

Q. What were you concerned about from Mr. Long? You had already searched him and he was standing there next to your (28) partner who is a police officer and has a revolver, doesn't he?

A. Right.

Q. Alright, what were you concerned about then?

A. Well my partner didn't have any reason to draw a gun on him. He didn't have a gun held on him. Number two, he is probably a foot taller than my partner.

Q. I see, well if that was your concern, why didn't you then take Mr. Long and take him over to your squad car then?

A. Cause I didn't have any reason to at that time.

Q. In other words you didn't have any reason even to have him standing next to your partner, is that what you are telling us?

A. I didn't have any reason to take him to the cruiser.

Q. Pardon?

A. I didn't have any reason to take him to the cruiser. At that time I was interested in the registration that I asked him for and when he walked up there, there was a knife there and we checked him and I checked inside the car for another weapon.

Q. I see.

A. If I hadn't found anything I would have asked him to get the registration.

Q. In other words what you wanted to do then was search the car for weapons or anything else that you may find before you asked him where the registration and the certification of insurance were?

(29) A. No sir, I checked the car for weapons, not everything.

Q. I see, now you say you had to lift up the arm rest, is that right?

A. Yes that is correct.

Q. You actually lifted it up?

A. Yes sir.

Q. Okay, now you didn't reach under there with your hand to feel, is that correct?

A. No sir, I just lifted the arm rest.

Q. You lifted it up—I see. At this point you say you saw a leather pouch?

A. Yes sir.

Q. Did you feel the pouch at all?

A. No sir.

Q. Could you put a gun in that pouch?

A. Could I put a gun in it?

Q. Yea, could you put a gun in it?

A. Yea, you could probably put a twenty-five automatic in it.

Q. But you didn't feel it?

A. No sir.

Q. To see if there was a tweny-five in it?

A. No sir.

Q. What you did is you actually opened it up and removed things from it, is that correct?

A. No sir.

Q. Pardon?

A. No sir.

(30) Q. Well what did you do to this pouch?

A. When I saw it I could see what appeared to be a plastic baggie so I shined my flashlight on it.

Q. And this is after you had picked it up and removed it from under the—

A. No sir I didn't touch it at all. The only time I touched it was after I thought I saw what appeared to be marijuana.

Q. After what you thought was marijuana?

A. Yes sir that's correct.

Q. You're an expert on what marijuana looks like I take it, is that what you're telling us?

A. Not an expert.

Q. Alright now at this point then you removed this plastic baggie, right?

A. Yes sir, I picked the pouch up and stood outside the vehicle by the open door.

Q. What else did you do to this pouch then?

A. The leather pouch itself?

Q. Yes.

A. When I did pick it up in the same compartment that the baggie was in I could feel a solid object. I removed the baggie, looked at the contents, also removed the glass bottle—

Q. Alright so this pouch has a glass bottle in it besides then?

A. Yes sir that's correct.

(31) Q. And that you couldn't see until after you removed the baggie, is that what you're telling us?

A. That's right, when I opened it up to remove the baggie, the bottle was there.

Q. I see and in this particular bottle you saw a white substance, is that right?

A. Yes sir that's correct.

Q. And at this point did your expertise tell you what that was?

A. I suspected it of cocaine.

Q. You suspected?

A. Right.

Q. I see.

A. I'm not even an expert on that.

Q. Pardon?

A. I said I'm not an expert on that. My partner—I asked him and he thought it was and he told me. I searched the other side of the pouch and as I stated there were two packages of cigarette papers, roll your own, there was a piece of tin foil with one white pill in it, prescription type pill.

Q. Now in order to find that you had to open the other side of the pouch and then you also had to open up the tin foil, is that correct?

A. That is correct.

Q. Then after opening up those two items, you saw one pill which appeared to be a prescription pill?

A. Yes sir.

(32) Q. Alright is that the only pill you found by the way?

A. Yes sir it is.

Q. Now is it at this point then that you go to Mr. Long and say you're under arrest?

A. Yes sir, as I stated he was standing—it would be to the typewriter or a little bit further away, I stated you're under arrest for grass.

Q. You're under arrest for grass?

A. Right.

THE COURT: You have to speak up now.

MR. HOWELL: I stated you're under arrest for grass.

Q. And that's what you told him—that expression?

A. Yes sir.

Q. I see, alright and then you asked, of course, as you've already told the request for the key to the car to drive the car out of where it was in the road and that's when you found out there was only one key and there was no trunk key, is that right?

A. Yes sir, I asked for a key.

Q. Alright and that's when you also saw that the lock in the trunk was punched out, is that correct?

A. Yes, after I received the key.

Q. And then it's at that point when you open up the trunk by using your knife, is that true?

A. Yes sir, that's correct.

Q. Alright, and in there that's when you find as a result of (33) opening up this trunk, that's when you find these two bags?

A. Yes sir.

Q. Alright, now did you ever ask Mr. Long if you could open up his trunk?

A. No sir, I did not.

Q. So there's no question you didn't get his consent to look into that trunk or to look into the car?

A. No sir.

Q. Okay, there's no question but what, as far as the pouch, you couldn't see that pouch until you lifted the arm rest?

A. I could see something but I didn't know exactly what it was.

Q. Okay, you didn't know what it was until you lifted the arm rest?

A. Yes sir.

Q. Alright, did you ever search that car after that for registration and proof of insurance?

A. I believe I stated previously after I told him he was under arrest I looked in the glove box of the vehicle, I did not find a registration for that vehicle.

Q. Alright so you went to the glove box then to find those items, is that true?

A. Yes, sir, also to check for other contraband.

Q. That's after you had found what you believed to be contraband?

A. Yes sir, that's correct.

Q. Let me ask you this, Officer, he was not in the car and (34) you wanted to see the registration and proof of insurance, is it not a fair statement that most people carry those two items in the glove box?

A. Either in the glove box or in their wallet.

Q. Alright, and you didn't ask him if his was in his wallet so his might have been in his wallet for all you know?

A. May have been but after I asked him he started walking towards the car.

Q. Alright, so at that point then was it your opinion that these items were probably in the glove box?

A. Yes sir that's correct.

Q. Now isn't it also a fair statement that if you were concerned about anything in the car, any weapons, that either you or your partner could have asked him if you could go to the glove box to get the proof of insurance and registration?

A. If we were worried about—

Q. Any weapons in the car?

A. That is possible.

Q. Well you certainly had him under your control, you have already told us that.

A. I wouldn't say we had him completely under our control.

Q. You wouldn't say that after you had already had him up against the car and after you have already searched him, you didn't think he was under your control?

A. We weren't holding him.

Q. Well I thought you said he wasn't free to leave?

A. That is correct.

(35) Q. So he wasn't free to leave and you had already searched him and what you're saying is that you didn't have him under your control, is that what you're telling this Court?

A. It all depends on what you mean by control.

Q. Well so that he couldn't run away or so that he couldn't try to jump in the car or something like that?

A. Nothing says that he couldn't push one or both of us away and try to run or jump in the car.

Q. I see, did you ever give him a traffic citation?

A. Yes sir I did at one point.

Q. Pardon?

A. Yes sir I did.

Q. And what was that?

A. That was for speeding.

Q. And that's all you gave him? Is that the only citation?

A. For traffic offenses, yes sir.

Q. Did you then take that citation back?

A. Yes sir I did.

Q. When did you give him the citation?

A. I believe I gave it to him shortly after he was booked or in the morning.

Q. Shortly after when?

A. Shortly after he was booked or in the morning, around seven o'clock, I'm not sure which.

Q. And when did you take the citation away from him?

A. After talking to the Prosecutor.

Q. So in other words it was voided out, is that what you are (36) telling us?

A. That is correct.

Q. Now as far as any weapon charge or anything pertaining to this so-called knife, he wasn't charged with any violation concerning that, was he?

A. No sir he was not.

Q. So the only thing he was charged with then are these charges which are here before this Court as a result of your going into his car and searching the car?

A. Yes sir, that's correct.

Q. He wasn't charged with being a disorderly person either, was he?

A. No sir.

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DIRECT EXAMINATION

By Mr. Weller:

Q. State your name please?

A. Rick E. Lewis.

Q. Are you employed?

(37) A. Yes sir I am.

Q. By whom?

A. Barry County Sheriff's Department.

Q. Were you so employed on August 25th of this year?

A. Yes I was.

Q. Directing your attention to the early morning hours, specifically near midnight or shortly thereafter, did you have cause to come in contact with the Defendant in this case?

A. Yes sir I did.

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Q. Did you come in possession of substances you believed to be contraband?

A. Yes sir we did.

Q. Did you exercise any control over that suspected substance?

A. Yes sir I did.

Q. What did you do in regard to transporting or in taking custody of that substance?

A. After the evidence was returned to the Barry County Sheriff's Department it was marked and sealed. I then transported it—

THE COURT: Who marked and sealed it?

MR. LEWIS: Myself and Deputy Howell. The evidence then was transported by myself to Michigan Department of Public Health Lab in Lansing the following morning. It (38) would be the same date.

Q. Did you deliver those substances to the Department of Public Health?

A. Yes I did.

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(45) • • •

CROSS EXAMINATION
By Mr. Jerkins:

Q. Deputy Lewis, how long have you been a deputy?

A. I've been a deputy approximately three years.

Q. Alright, have you had any specialized training in narcotics?

A. Yes sir I have.

Q. And what is that?

A. I worked with the regional crime unit for approximately a year and a half.

Q. And other than working with them, has that been the extent of your specialized training?

A. No sir, I worked undercover for approximately a year and a half. I attended the DEA school, Drug Enforcement Administration School sponsored by the Federal Government on narcotics.

Q. I see, now on this particular occasion, the 25th of August, who was driving the cruiser?

A. Deputy Howell.

Q. And did you see a vehicle go past your cruiser in the opposite direction?

A. Yes I did.

(46) Q. And did you observe who, if anyone, was in that vehicle?

A. No sir.

Q. You didn't observe if it was one, two, three or four people or male or female?

A. Not at that time, no sir.

Q. Alright, I take it then that your cruiser ultimately stopped and turned around to go after this vehicle?

A. That's correct.

Q. Did you have this vehicle in your vision at all times?

A. No sir, not at all times.

Q. And when this vehicle made a turn, a left turn, as there as been some testimony, did you see it make a left turn?

A. Yes sir, I saw the tail lights go around the corner.

Q. Alright, and did you see the vehicle come to a stop?

A. Yes sir, I did.

Q. You did see it come to a stop?

A. Yes sir.

Q. Alright, did you see anyone get out of the vehicle?

A. Yes sir I did.

Q. And how many people got out of the vehicle?

A. One person.

Q. One person—where was that person when the cruiser pulled up?

A. Sitting in the driver's seat in front.

Q. Alright, now I take it that you got out of your cruiser?

A. That's correct.

Q. And the other Deputy Howell got out of the cruiser likewise?

(47) A. That's correct.

Q. The two of you approached this subject?

A. Yes sir.

Q. And that individual, was he asked for anything?

A. Yes he was.

Q. And what was that?

A. He was asked for his driver's license, registration and proof of insurance.

Q. And did you get any response?

A. Not the first time.

Q. Second time?

A. Yes sir.

Q. What response did you get?

A. He produced his driver's license.

Q. Did he say anything?

A. No sir.

Q. Alright and after he produced the driver's license, then what happened?

A. He then was asked to get his registration and proof of insurance.

Q. Did he say anything.

A. No sir.

Q. How many times did you ask that?

A. I believe he was asked twice.

Q. What happened after the second request?

A. He started to walk towards the open driver's door of his vehicle.

(48) Q. Alright and then what occurred?

A. At that time Deputy Howell and myself spotted a knife laying along side the front seat.

Q. And then what occurred.

A. At that time he was told to stop. I retrieved the knife and Deputy Howell patted him down to make sure he did not have any more weapons.

Q. Alright and at this particular time was he placed under arrest?

A. No sir he was not.

Q. Now he was patted down and had his hands up on the car at one time, is that correct?

A. That is true.

Q. Was he free to leave?

A. Yes sir at that time he could have walked away.

Q. He could have walked away?

A. Yes sir.

Q. I see. Now did anyone ask then of Mr. Long where his registration and proof of insurance was?

A. I don't recall if he was asked at that time or not.

Q. What did you do after he had been searched?

A. I stood there beside him and I had the knife in my hand.

Q. What was the purpose of your standing next to him?

A. Just to make sure that he didn't have any weapon on him that he could use on either myself or Deputy Howell.

Q. Well, hadn't he already been searched?

A. Yes sir.

(49) Q. And no weapon was found?

A. That's correct.

Q. So you knew that then?

A. Can't be positive.

Q. Oh, you can't be positive. You were there though to see that he was under control, is that what you're saying?

A. I was there to see that he did not harm anyone.

Q. Alright, so that he couldn't do anything that would cause any harm to either you or Deputy Howell, is that true?

A. That's correct.

Q. So that are you satisfied in your mind at that point that you had him under control so that he couldn't do any harm to either you or Deputy Howell?

A. No sir, he could have ran. He could have ran at my partner.

Q. Alright, he could have run?

A. Yes sir.

Q. But you were aware that you were there and could do something about that if he did or at least try to do something?

A. Try to do something, yes sir.

Q. Alright, now was it at this time then that Deputy Howell started searching the vehicle?

A. At that time he went into the vehicle, yes sir.

Q. What did you observe Deputy Howell doing?

A. I could not see in the vehicle, I was standing towards the rear of the vehicle. I could not see in the vehicle.

Q. Did you see him looking under seats?

(50) A. I saw him in the vehicle but I couldn't tell what he was doing.

Q. You don't know what he was doing?

A. No.

Q. I see, now did there come a time that the registration and the proof of insurance, at least some papers, were located?

A. Yes sir.

Q. When was that?

A. Deputy Howell found several different types of papers in the vehicle.

Q. When? At the scene there or later on at the garage or what?

A. At the scene.

Q. At the scene. Was this before or after he handed you these items which you have testified to and had sent to the laboratory?

A. That was before he found the other stuff.

Q. You mean he found the papers before he found the items which you believed to be narcotic items?

A. Yes sir, he found some of them laying on the floor in the front seat underneath the driver's seat which he found as soon he looked in.

Q. Well can you tell us whether or not he found the registration and the proof of insurance before he found what you suspected to be narcotics?

A. No sir, I believe he searched the vehicle for weapons first and at that time he found them. Like I say there were papers on the floor and all over the car.

Q. Well he found what when he was searching for weapons?

(51) A. He found the pouch.

Q. He found the pouch? You don't know where the pouch came from?

A. I did not see where it was at. All I know is what Deputy Howell told me.

Q. Alright now who arrested Mr. Long?

A. Deputy Howell placed him under arrest.

Q. And what was he arrested for?

A. Possession.

Q. Of what?

A. Marijuana to start with and then the other things.

Q. Alright, he didn't give any consent to either you or Deputy Howell to search the vehicle, did he?

A. That's correct, he did not.

Q. He did not, alright, after he was arrested you had custody of the vehicle, did you not?

A. That's correct.

Q. And in fact you made arrangements to have a wrecker come and take that vehicle down to the sheriff's garage, is that true?

A. That's correct.

Q. And in fact it was taken into the sheriff's garage, isn't that true?

A. That's correct.

Q. Was it searched again down there by the way?

A. I don't know if Deputy Howell searched it. I know I did not search the vehicle again.

(52) Q. In any event there's no doubt in your mind but what that vehicle was safe and secure in the sheriff's garage?

A. Yes sir.

Q. And there's no question in your mind but what you knew that Mr. Long was elsewhere than with vehicle, is that true?

A. That's correct.

Q. That vehicle wasn't going anywhere without either you or Deputy Howell releasing it, isn't that true?

A. That's correct.

Q. In fact isn't it also true that same control over that vehicle began when you first saw the knife?

A. No sir, it began when he was placed under arrest.

Q. When he was placed under arrest. You're saying then that you had no control over that vehicle until after Mr. Long was placed under arrest?

A. No actual control, yes sir.

Q. Pardon?

A. No actual control.

Q. Well, were you going to let Mr. Long go into that vehicle after you had seen the knife?

A. No sir.

Q. Alright, in fact you wouldn't let him do that, would you, if he tried to make any effort to do that?

A. That's correct.

Q. So that as far as you were concerned Deputy Howell then had control of that vehicle. Mr. Long wasn't going to get in (53) there cause you weren't going to let him?

MR. WELLER: Objection, how can he say what Howell was doing.

THE COURT: Alright, sustained.

Q. In any event you knew that Mr. Long didn't have any control over that vehicle at that point?

A. I knew that he was outside the vehicle.

Q. Alright, fine.

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THE COURT: Any Motions, Mr. Weller?

MR. WELLER: Well I would move to bind the Defendant over. I understand the Court wishes to reserve ruling on that motion until briefs are submitted.

THE COURT: Mr. Jerkins?

MR. JERKINS: Yes, your Honor, I would move for dismissal of all the charges against my client on the basis (54) of illegal search and seizure and the fact that there has been no showing at all that my client had any knowledge of these items in the vehicle nor that he had any control over these. It is my understanding likewise, as Mr. Weller has stated, that the Court will reserve its decision until such time as we furnish briefs on these legal points.

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STATE OF MICHIGAN
IN THE DISTRICT COURT
FOR THE COUNTY OF BARRY

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, versus DAVID KERK LONG, Defendant.	FILE NO. A-506-77 A-507-77 A-508-77

OPINION
(Filed: December 28, 1977)

Defendant herein is charged with three charges of violation of the Controlled Substance Act, to-wit: methaquelone, cocaine, and marijuana with intent to deliver. Preliminary Examination was held on all three charges. At the Examination the Prosecutor introduced evidence of the three substances involved. The contraband was admitted subject to Defendant's objections. Examination on all three charges was concluded with the stipulation that Defendant would file a brief touching on the initial search and seizure of the controlled substances. The Prosecutor has filed a reply brief.

It appeared from the testimony that the automobile driven by the Defendant was clocked with speeding at 71 miles per hour by two deputies of the Barry County Sheriff's Department. The deputies pursued the Defendant who ultimately ended up in the ditch. The deputies exited their vehicle and were met by the Defendant at the rear of his vehicle. After being asked twice for his driver's license and proof of registration, the Defendant started to walk toward the driver's door of his vehicle. The door was open and the interior light on.

At this time one of the deputies noticed a large "folded knife" lying on the floorboard of the car. At this point the Defendant was frisked for weapons and the knife retrieved from his auto. The deputy then shined his flashlight into Defendant's vehicle and saw something on the front seat. The deputy then knelt in the vehicle and lifted up an armrest where he found a pouch containing marijuana, a glass bottle of cocaine and also a white pill wrapped in tinfoil. At this point the Defendant was placed under arrest. The remainder of the vehicle was searched and nothing was found. It was also determined that the car was owned by someone other than the Defendant.

The officer asked the Defendant for the keys to his car inasmuch as the vehicle would have to be towed away because the Defendant was under arrest. The Defendant produced a single ignition key and stated that he had no key for the trunk. The deputy observed that the lock had been punched out of the trunk and he opened the trunk with the use of his pocketknife. The deputy testified his reasons for opening the trunk were (1) because he had already found marijuana in the passenger compartment and (2) to see if there were any valuables in the auto before it was towed away. The search of the trunk produced the marijuana that resulted with Defendant's being charged with possession with intent to deliver in File No. A-507-77. It should be added that Defendant at no time consented to the search of the vehicle.

Defendant has raised two questions regarding the two searches. First, did the officers have a right to search the interior of the vehicle after observing a folded knife in the car? Secondly, was the forcible opening of the trunk lawful after the Defendant had been arrested?

The Court has had an opportunity to review the briefs submitted by both parties and the law involved. In *People* v *7th District Judge*, 55 Mich App 471, the Court stated:

"The legality of a search conducted without a warrant depends upon the law's appraisal of its reasonableness. Probable cause is the test. It is not suspicion but rather stems from some fact, circumstance, or information which would create an honest belief in the mind of a reasonably prudent man. In determining probable cause, this Court is limited to the facts, circumstances and information known to the officer at the time of the arrest and seizure

. . .

"Cases and factual situations differ and each case becomes unique. In assessing reasonableness we are required to consider the pertinent facts known by the officer. What is reasonable under the circumstances results in a subjective evaluation. Does the search, in this case, meet the standard of reasonableness established by the US Const, Am IV, unreasonable searches and seizures? . . .

The events leading up to the seizure of the pouch were unique. The Defendant was pursued by the deputies for speeding. In bringing his vehicle to a stop he went partially into a shallow ditch along the roadway. He then exited his vehicle leaving the driver's door open and the interior light on and met the deputies at the rear of his vehicle. He had to be asked twice for his driver's license before he produced it. The deputy further testified that the Defendant appeared to be "under the influence of something". At this point the Defendant was asked twice for his registration and proof of insurance. Without any explanation, the Defendant started walking toward the open door of his vehicle. The deputies followed and it was at this point that they saw the knife on the floor. The Defendant was then frisked which was consistent with *Terry* v *Ohio*, 392 US 1; 88 S Ct 1868; 20 L.Ed. 2d 889 (1968). After the knife was confiscated and before allowing the Defendant back into the interior of the car to

get the registration, the deputies conducted the search which produced the pouch. After a review of the facts involved in this search, it is the Opinion of the Court that the deputies acted reasonable in conducting a search of the vehicle.

The reasons for the search of Defendant's trunk seem to be two-fold: (1) that it was incident to a lawful arrest; and (2) that the Officer was conducting an inventory search. It is fundamental that an officer may not search an individual's automobile based on a traffic stop alone. In *Peo.* v *Small*, 67 Mich App 580, the Court allowed a warrentless search of a Defendant's trunk based on *Chimel* v *California*, 395 US 752; 89 S Ct 2034; 23 L.Ed. 2d 685 (1969) and held that such a search was proper when incident to a lawful arrest. In *Peo.* v *Clark*, 5 Mich App 672 (1967), the Court held that:

> "Seizure of incriminating evidence incidental to lawful arrest is proper so long as the search and seizure is reasonable."

As stated earlier in this Opinion the circumstances surrounding this traffic stop and arrest were indeed unique. All the factors surrounding the incident lead to the reasonableness present when the deputy searched the trunk of the Defendant's car as an incident to lawful arrest.

Moreover, the policy testified that it was the department's policy to check a vehicle to insure that nothing valuable can later claim to have been stolen. The Court is satisfied from the testimony that the intrusion into the trunk constituted an inventory search pursuant to *Gambino* v *United States*, 275 US 319; 72 L.Ed. 293; 48 S Ct 137 (1927). Accordingly, it is the Opinion of the Court that the search of Defendant's trunk was proper.

It is the finding of the Court that the crimes as set forth in File No. A-506-77, A-507-77 and A-508-77 have been committed and there is probable cause to believe the Defendant committed them and he is bound over to the Circuit Court.

KENNETH A. HANSEN /s/
District Judge

Dated: December 28, 1977.

INFORMATION

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF BARRY
County of Barry

THE PEOPLE OF THE STATE OF MICHIGAN vs. DAVID KERK LONG	CASE NO. DEMING 78-100-FY

Date of Offense On or about, to-wit: August 25, 1977
Location Township of Orangeville, Mullen Road
Complainant George Howell
Complaining Witness George Howell

WITNESSES (*Preliminary Exam)
George Howell, Ricky Lewis, Nancy Wagner, William Brake

STATE OF MICHIGAN }
County of Barry } ss.

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, Now comes the Prosecuting Attorney in and for the said County, State of Michigan, who prosecutes for and on behalf of the People of the State of Michigan, in said Court in the current term thereof, and gives the said Court to understand and be informed that the above-named Defendant(s), heretofore on or about the DATE OF OFFENSE set forth above, at the LOCATION set forth above, in the said County, State of Michigan.

David Kerk Long of 159 North Park Drive, Grand Rapids, Michigan, did then and there possess with intent to deliver a certain controlled substance, to-wit: Marijuana; Contrary to M.S.A. 28.1070(41)(1)(c).

Punishable by imprisonment in the State Prison for not more than 4 years or by a fine of not more than $2,000.00 or by both such fine and imprisonment.

and against the Peace and Dignity of the People of the State of Michigan.

JAMES H. FISHER /s/
Assistant Prosecuting Attorney

(3) • • •

THE COURT: In 78-100-FY, this will be the pre-trial order. Each of the parties have indicated they're ready for trial. The trial is set for Monday, May 8th, 1978, at 9:00.

The Prosecutor intends to offer as to the physical exhibits a leather pouch, two large bags of marijuana, 3 small bags of marijuana, one large folding Browning knife.

The Prosecutor indicates he has no written statements signed by or given by Defendant. He indicates he has (4) no verbal confessions or admissions by the Defendant.

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Barry County Circuit Court — Denial of Motion to Quash and Suppress (April 28, 1978)

(3) • • •

The Court has had the opportunity and—to read, in the Court's opinion, a real good brief on the part of the defendant, and a real good brief on the part of the People, and a good reply brief on the part of the defendant. It's enjoyable to read good briefs. The Court has studied them, and it appears that in this case, there was a warrant and search of an automobile which was being driven by the defendant (4) of some 71 miles an hour at 12:05 in the morning.

It appears that the police officers observed the—the defendant exceeding—as far as this Court is concerned—extremely exceeding the speed limit, and that subsequently, at least the front end of the defendant's automobile ended up in the ditch, and the defendant's automobile was crossways to the road, and as I remember the transcript the—the police were satisfied that that was the automobile that they had observed going some 71 miles an hour.

When the police got there, the defendant exited the automobile, and the door of the automobile remained open after the defendant exited it. When the police officers asked the defendant for his registration certificate and proof of insurance, the—the defendant—at least the proofs were, that the defendant started towards this open door of the automobile, and at that time, the police officers observed a large folding knife on the floorboard of this automobile. At that time, the defendant was detained and a search was made of the defendant's person for weapons and a search was made of the automobile for weapons.

Now, in making this search for the weapons, the—the leather pouch was found, and as the Court remembered the testimony, it was—it was a split-bench type of a front seat, and that because it is—it was a split-bench, then there's an arm rest that folds down on the passenger side of the driver, and this leather pouch was beneath that, and yet it was visible, as I remember the testimony.

(5) The officer removed the leather pouch, and as I remember, it was open, and the officer found a material which was not unlike marijuana. And also in this leather pouch, there was a vial, and it contained a white powder. The powder was something not unlike cocaine. And there was also a pill in some sort of a metal foil. This was seized by the officer. Then subsequently, the officer found two large bags of what appeared to be marijuana in the trunk of this automobile.

Now, to determine the motion of the defendant in this case, the Court must determine whether the search was reasonable or not, and I'm satisfied the officers were justified in searching the automobile for their own protection. They observed this large knife and that they believed the defendant was under

the influence of something from his actions. As I remember, he refused to say anything. When they asked him for his driver's license, I think he didn't say a thing.

I'm satisfied that with the condition of the defendant, as viewed by the officers, his movement towards the automobile, and the view of the large knife, caused the officers to be apprehensive for their own safety, and therefore, they could make a search for weapons within the immediate surroundings of the defendants.

I'm satisfied that this leather pouch could have contained a weapon, and therefore, was ample reason for the police officers to examine. I find that the officers examined in a reasonable manner and that the contents of the leather pouch were properly admitted into evidence by the Examining (6) Magistrate. The District Judge held that the intrusion into the trunk constituted an inventory search and such was permissible. From my review of the testimony of the officers, and there was testimony to the effect that the examination of the trunk was made for the purposes of determining what valuables were contained in this automobile, and the officers didn't use the chosen words of inventory, but I'm satisfied when the officers said that they're concerned about valuables, that they meant inventory. I'm satisfied that that's why the trunk was opened.

So, I'm satisfied from the reading of the preliminary examination transcript that there was reasonable cause for the police to open the trunk, and I'm satisfied that the Magistrate did not abuse his discretion in admitting evidence of the contents of the trunk.

The defendant was the only person within the—the defendant was the only person within this automobile, and we

know from *People* v *Ridgeway*, 74 Mich App 306, a 1977 case, in which they cite *People* v *Gould*, 61 Mich App 614, a 1977 case, that the presence in or control over a vehicle in which a substance is found is of possession of the substance.

There was a large quantity of marijuana within this vehicle. With the benefit of *People* v *Serra*, it is 55 Mich App 514. which states that, and I quote, "Prosecutions involving large amounts of marijuana will not require a presumption to convince a jury that the possessor intended something other than personal use. The inference may follow (7) of its own force."

By binding the defendant over, the Magistrate so found the question of probable cause is primarily one for the consideration and determination of the Examining Magistrate. This Court may not substitute his judgment for that of the Magistrate except when there is a clear abuse of discretion or that a clear abuse of discretion is apparent.

I'm satisfied from what I have said and from the facts that I have found, that this Court determines and this Court determines that the Magistrate did not abuse his discretion, and the motion of the defendant to quash the information and/or suppress the evidence is denied.

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Barry County Circuit Court — Motion in Limine (August 28, 1978)

(71) • • •

MR. JERKINS: The first motion I have is a motion in limine or a motion to strike from the information the address which is in the information. It says, David Kerk Long—and this would be the beginning portion of it—of 159 North Park

Drive, Grand Rapids, Michigan, then, did then and there— I see where that is not necessary for the prosecution to have in the information. In fact, if anything, I suppose it might even pose a proof problem, because that would then have to be an element to show that David Kerk Long resides at 159 North Park Drive, Grand Rapids, Michigan. And, on the other hand, if anything, it might be construed to be prejudicial to try to influence the jury that here is a man who is outside of our community who is charged with this crime, and I think that in order to simplify all matter, (72) if the information just deletes that paragraph which begins: of 159 North Park Drive, Grand Rapids, Michigan, I think that solves that particular problem.

MR. FISHER: No objection, your Honor.

THE COURT: The address that is contained in the amended information is striken.

MR. JERKINS: Thank you, your Honor.

Now, the other motion I have is also a motion in limine which—so that, again, we do not run into any problem during the course of the trial, and that is, the Court is well aware that my client is also charged with two other crimes. He's charged with Possession of Cocaine and Possession of a Quaalude pill, both of which arise out of a pouch that is found in the vehicle, and I would ask the Court to rule that there should be no reference made to these items contained in the pouch, and in fact, I believe there should be no references made to the pouch in the presence of the jury. Again, it has nothing to do with the substance of this particular charge. If anything, it would be nothing more than a prejudicial effect upon the jurors. I think that if the prosecution is concerned as to the record as to the stopping and the arrest of my client,

that there is a way that that can be handled, and that would be to excuse the jury so that testimony could be taken out of the presence of the jury as to what the officers did pertaining to the pouch (73) so that the record would be clear in that regard. But as far as the jurors hearing anything about the pouch and the contents of the pouch, it would be more prejudicial than it would be probative in this situation, and, of course, the Court has already ruled in the past for a separation, stating that it agreed with counsel that this would be prejudicial if it were part of this trial. So, in order to have a clean record, I think that we should get that cleared up before we get into the actual testimony in the trial.

THE COURT: Thank you.

Mr. Fisher?

MR. FISHER: Well, your Honor, I agree with part of Mr. Jerkins' motion. There is a pouch which we do intend to introduce in evidence in this trial. The pouch contained a pill which was later analyzed to be a Quaalude, a controlled substance, as well as a vial containing a small amount of what was analyzed to be cocaine; but it also contained a bag of marijuana, which is the charge with which we are concerned in this trial, and I intend to introduce the pouch into evidence and intend to introduce the fact that marijuana was found in that pouch. I do not intend to make any reference to the other controlled substances that were found in the pouch. But I do think that it's necessary for the prosecution of this case, the jury have the information that that pouch was found next to the driver's seat, since this is a (74) specific intent crime. They should have all available evidence which may have bearing upon the defendant's intent.

THE COURT: Thank you.

Mr. Jerkins?

MR. JERKINS: Except, your Honor, I would point out, that's not what we're trying here, because the prosecution all throughout all prior proceedings, preliminary exam and motions here in Court, has always led counsel and the Court to understand that the basis of this charge are those items which were found in the trunk of the vehicle, which are two particular sacks of marijuana. At no time has he alleged that marijuana, a small quantity—a very small quantity, as a matter of fact, that was contained within the pouch was the substance of this, and in fact, that even belies his whole theory, because the reason he is charging more than simple possession and that he is charging intent to deliver is based on the quantity, and the quantity is that which was in the trunk, not having anything to do with that which is within the particular pouch. And for that reason, your Honor, I—I don't find that as part of this case. There's no connection, even. In fact, it puts a tremendous burden on the prosecution, and if the Court would allow him to use that marijuana which is within the pouch, then I believe the Court, likewise, has to say to the prosecutor, you had best connect up the marijuana that's found within that pouch to the marijuana (75) that's in the trunk, otherwise, at that point, what is coming in is more prejudicial than it is probative.

THE COURT: There is no question that anything in the—in this pouch that would be called cocaine or anything called another substance other than marijuana, obviously, may not be introduced before the jury, and the question becomes whether or not marijuana that was found—I notice in your pre-trial statement that you intend to offer two large bags of marijuana, and then you stated three small bags.

MR. FISHER: That's correct, your Honor. The—

THE COURT: Is one of the small bags included in this leather pouch?

MR. FISHER: Pardon me? No, what the other two small are samples that were taken out of the large bags and transmitted to the Michigan State Police Crime Detection Laboratory for analysis.

THE COURT: Is that it? There are three small bags?

MR. FISHER: That's correct. One of those three was one that was found in the leather pouch. That small bag was taken to the Crime Lab for analysis. Then the other two small bags contain samples taken out of the two large bags, which, then, those two small bags were also taken to the Crime Lab for analysis.

THE COURT: Well, Mr. Jerkins, it's obvious from the pre-trial statement, as this Court visualized it, anyway, (76) that the defendant had reason to believe that the small bag of marijuana was part and parcel of this offense, because it's listed as one of the physical exhibits.

MR. JERKINS: We're not claiming surpise, your Honor. We're not claiming that at all. What I'm claiming is that he has always, throughout even the preliminary transcript and so forth, contended that the basis of this charge is the large quantity which is within the trunk. He is not charging my client with just the ordinary charge of possession. I would concede the point that if all we are talking about was possession of marijuana, then I could not raise this issue. But since he is talking of the charge of Possession with Intent to Deliver, which, obviously, is totally different, and he's relying on the quantity in the trunk, then the small quantity in the car has nothing to do with that, and that's the difference, and

that's the distinction that I am making and pointing out: that if—if he's allowed to do that, then he had best be prepared to connect that small amount that's in the pouch to the large amount that's in the trunk, because if he can't connect it, then what is the relevancy and materiality and the point of having it come in other than to have a prejudicial effect.

THE COURT: Thank you. I'm going to give each of you gentlemen an opportunity to just give me a little—a little letter brief on this so that I can have it tomorrow (77) morning, then I'll be prepared to rule on that.

MR. JERKINS: I take it, at this point, you have ruled as far as the quaalude and cocaine, that's out?

THE COURT: Absolutely.

MR. FISHER: I have no objection to that.

THE COURT: Thank you.

Barry County Circuit Court — Motion to Suppress (August 28, 1978)

MR. JERKINS: I do have one other matter I forgot. I misspoke when I said two. I have a third one. This one goes to the legal. The Court will recall that I filed a motion to suppress, and we both filed briefs before your Honor, and the Court rendered its decision in regards to my motion to suppress last April—April 28th, 1978. I would like to call to the Court's attention that since then, there have been some cases that have come out that I think may cause the Court to reconsider and possibly grant my motion, and as a result, further proceedings in this matter would not be necessary. I call to the Court's attention a Michigan Appeals decision, which is *People* v *Garcia*—that's G-A-R-C-I-A—81 M[illegible]an

Appellate. Now, at that—or in that particular case, your Honor, this, again, is a traffic stop. This, again, is a factual situation where the individual was out of the vehicle, as we find in this case. The individual was frisked for weapons, and at that point, the officers proceeded even beyond that and charged Mr. Garcia with possession of—I believe it was cocaine in that (78) particular case—and the Court of Appeals ruled that after a traffic stop and after frisking the individual so that the safety of the officers has been determined, that any further search is contrary to the law, is impermissible, and anything that is found thereafter is subject to suppression and should have been, ergo no conviction, and that's what that case holds. That case is almost directly on point with this case here, and I call that to the Court's attention because we have had a case stay that came down subsequent to the decision of this Court, so the Court did not have that available nor did either counsel have that available.

I also would call to the Court's attention another case that has come down since then. It's a Federal case, and it's a rather well-reasoned case, and it's, again, one that goes to the Terry-type search, which, again, we have in this case, which also speaks as to the *Pennsylvania* v *Mimms* case which also applies in this situation, since they both go to searches of individuals by vehicles and how far one can proceed. This particular case is called *Canal Zone* v *Bender*—B-E-N-D-E-R. It's Capital C capital A—and I don't have—capital C capital A 5, and its dated 6-2-78. Probably what I can do is give the Court a Zerox of the Criminal Law Report which I have which came out on July 26th, 1978, which is 23 Crim Law, page 2,359, and I can give the Court what I have which we have received which speaks to this particular (79) point, and at this particular case, what we're talking about here is the officer had the two men in the car exit the car, and after they had positioned themselves between the men and the car, then the officer, as the

Court said, went too far by poking their head into the vehicle looking for weapons, and then they subsequently found a pot-filled frisbee under the front seat. And the Court ruled there that this is too far; that under the circumstances, searching the vehicle was not reasonably necessary to the accomplishments of the goal. And I cite that again, showing that the—the Court's are saying that the exception to the warrantless search has to be shown very clearly. There has to be necessity and that we start from the presumption that any warrantless search is illegal unless it falls within one of the exceptions, and that's what the Court is saying, and I submit that those two cases are recent cases which further buttress our position in this particular case.

THE COURT: Thank you, Mr. Jerkins.

Mr. Fisher?

MR. FISHER: Well, your Honor, I am not familiar with those cases, and since the ruling does depend on the specific factual situation, I can't really respond at this point. I would like an opportunity to perhaps submit a short brief to the Court tomorrow.

THE COURT: Thank you very much. You'll have an (80) opportunity to read those between now and tomorrow morning.

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PROCEEDINGS OF JURY TRIAL
AUGUST 29, 1978

(117) • • •

Yesterday, the Court took under advisement a couple (118) of motions of Mr. Jerkins'. The first motion had to do with the motion in limine to deny the prosecutor the right to bring in testimony that a leather pouch yielded a small plastic bag of what they claim to be marijuana. The Court read carefully the two cases which were cited by Mr. Jerkins, the one being *Canal Zone* v *Bender*. Mr. Jerkins was kind enough to give the Court a photocopy of the Criminal Law Report of this case. And Mr. Jerkins also cited the case of *People* v *Garcia*, which is in 81 Michigan Appeals 260, which is a 1978 case. The Court carefully reviewed each of these cases. The *Bender* case, this was a case that—down in the Canal Zone, and apparently, a couple of police officers observed a couple gentlemen sitting in an automobile. The gentlemen exited the automobile. The—the—as I remember, the police did not conduct a patdown or anything, and the Court believed that there was no reason for them even to search the car.

The *Garcia* case was a case where a person made a left-hand turn, got out of a car. The—again, the police patted down the guy—I guess that's a good word—patted down the defendant.

Now, in this case, there was a patdown of Mr. Long, and in this case, Mr. Long started towards the car, and at that time, the police observed a folding knife laying on the floorboard near the outward edge of the seat. Now, at that time the police did conduct a patdown search. The facts are (119) completely different in each of these two cases. Because of that, the Court will allow the evidence to be presented. The

Barry County Circuit Court — Jury Trial — Motion to Suppress Denied

Court also, as I've stated in an opinion I wrote, that there was also a search of the car for inventory for valuables. The Court is satisfied that this is a marijuana case and this evidence of marijuana may be used to show motive or intent, and it's of a like act, and the Court is satisfied that the probative value outweighs any prejudice which may occur to the defendant.

Return the jury, please.

• • •

Barry County Circuit Court — Jury Trial — Directed Verdict on Charge of Possession with Intent to Deliver

THE COURT: is satisfied that the opening statement made by the prosecutor failed to disclose to the jury the facts and neglected to use to show possession—strike that—intent to deliver the controlled substance, and the motion of Mr. Jerkins is granted to that extent. However, the Court is not going to dismiss the entire case as requested by Mr. Jerkins. The Court is satisfied that the opening statement of the prosecutor included the lesser included offense of possession of a controlled substance.

You may return the jury.

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(126) • • •

DIRECT EXAMINATION
By Mr. Fisher:

Q. State your name, please.

A. George Howell.

Q. What's your occupation, Mr. Howell?

A. Deputy Sheriff, Barry County.

• • •

Q. How long have you been so employed?

A. I have been with Barry County, this time, almost eight years. I've been with three—three years with the Detroit City Police prior to employment here.

Q. Now, Deputy Howell, directing your attention to the morning of August 25th, 1977, do you recall what shift you were working that day?

(127) A. Yes, sir. I was working from eleven at night 'til seven o'clock in the morning. That would be eleven o'clock on the 24th of August 'til seven A.M. on the 25th of August.

Q. Do you recall where you were shortly after midnight that morning?

A. Yes, sir. I was in a parked cruiser. I was driving southbound on Norris Road and I was south of Keller Road. Deputy Lewis was my partner.

Q. Pardon me?

A. Deputy Lewis was my partner. He was riding with me.

Q. And what township were you in at that point?

A. That would be Orangeville.

Q. Is that in Barry County?

A. That is correct.

Q. Did anything happen that caught your attention?

A. Yes, sir. As I stated, we were southbound. We met an oncoming car, a car that was driving towards us in the northbound lane. We were equipped with a moving radar unit. It tripped our radar at 71 miles an hour.

Q. What did you do at that pont?

A. At that point, as the vehicle passed us, tried to make an observation of the vehicle, some type of description. I turned around in a driveway and attempted to catch the vehicle.

Q. Could you tell what kind of car it was as it went past you?

(128) A. No, sir, I could not tell the make of the car. It appeared to be a Dart, possibly dark green. The passenger– as it went by, I looked in my sideview mirror. The passenger side taillight on the vehicle, the outward portion, was broken so that there was partially red light and partially white light on the taillight on the passenger side.

Q. Could you tell how many people were in the car as it went past?

A. As it went past, it appeared to me to be one. I could—

Q. One person other than the driver or just the driver?

A. No sir. It appeared to be the driver only.

Q. Pardon me? I didn't hear you.

A. It appeared to be the driver only.

Q. Now, as you turned your car around at this—and got headed in the same direction as this car, were you—did you have it in sight at that point?

A. At that time, I had it in sight. Shortly thereafter, I lost sight of the vehicle. It's quite hilly in that area, and curves.

Q. And for how long a period of time did you lose sight of the car?

A. It would be seconds. Exactly how long, I could not tell you.

Q. Well, about how many seconds was it? two or three? or was it thirty or forty?

A. Probably five—five to ten seconds, somewhere in that area.

(129) Q. And where did you next see this car?

A. At this time, after I turned around, we were northbound towards Keller Road. There are some curves right there before you get to Keller Road. I went through the curves. I again picked the vehicle up in sight as it was crossing Keller Road and it was headed northbound on Norris Road, yet. There is a long hill that goes up. When the vehicle reached the top of that hill, I momentarily lost sight of it. I was gaining on the vehicle. As I approached Mullen Road, I again picked up the taillights of the vehicle. The vehicle made a left-hand turn onto Mullen Road. At that time, the vehicle would be westbound on Mullen Road and I was northbound. There are some trees, some shrubbery. I could not make the vehicle out clearly. It appeared that the vehicle swerved. As I approached Mullen Road, I made a left-hand

turn onto Mullen Road. The vehicle was sitting crossways in the road. The front of the vehicle would be in the ditch on the north side of the road.

Q. Were there—while you were trying to catch up with this car, did you cross any other—come across any other traffic?

A. No, sir, there were none.

Q. Did you see any other cars on the road at that time?

A. No, sir, I did not.

Q. What did you see when you arrived at the scene? Did you get out of the car, then?

(130) A. Yes, sir. After making the turn—the vehicle crossways in the road was approximately a hundred and fifty feet west of the intersection—pulled up to the vehicle. Our headlights were approximately from here to the—excuse me—the large doors there. We had our bright lights on. I turned my overhead lights on. We got out of our vehicle. The driver of the vehicle was sitting in the driver's seat.

Q. Could you see anyone else in the car?

A. No, sir. There was no one in the car. We observed no one in the area. I observed no one in the area.

Q. And did you have contact with the driver of the car, then?

A. Yes, sir. Upon exiting our cruiser, we walked towards that vehicle. The driver of the car got out of his vehicle and walked to the rear of his vehicle by the trunk, and that's where we met him.

Q. What type of a car was it?

A. It was a '72 Mercury two-door. I believe it was a Brougham, '72 Mercury Brougham.

Q. Do you see the driver of the car in the Courtroom today?

A. Yes, sir, I do. He's the gentleman with glasses, suit on. (indicating)

Q. Thank you. Did you ask the defendant for his driver's license?

A. Yes, sir. When he met us at the trunk, he did not say anything, and I asked him for his driver's license. He didn't (131) respond or didn't move to get his license; he just stared at me. I asked him again for his license. He waited a few seconds, then he reached and got his wallet and got his license out and gave it to me.

Q. Did you then ask for the registration for his car and proof of insurance?

A. Yes, sir. I looked at his license and asked him for the registration for the vehicle and his proof of insurance. He did not say anything. He did not move. He just looked at me. I again asked him for the registration and the proof of insurance for the vehicle. At this time, he turned around and walked around the driver's side back fender and started walking towards the driver's door of the vehicle, which was open. Approximately in the area of the rear tire, I observed a knife lying on the floorboard of the vehicle. I was behind Mr. Long—

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THE WITNESS: I observed a knife laying on the floor of the vehicle. I was behind Mr. Long. My partner, Deputy Lewis, would be to the left of Mr. Long.

• • •

(132) Q. I'm showing you an object marked—which has been marked as People's Proposed Exhibit Number 1. Can you identify that?

A. Yes, sir. This is the knife Deputy Lewis picked up from the trunk. It's the one I observed laying on the floorboard.

• • •

Q. That's a folding knife, Officer Howell. Was it opened or closed at the time you saw it?

A. Was it opened or closed?

Q. Yes, when you saw it on the floor.

A. It was closed.

Q. It was closed?

A. Yes, sir.

Q. Did you—what did you do after you picked up the knife?

A. I did not pick it up. Deputy Lewis picked it up. When I saw the knife, I said, "Hold it." And I believe, to the (133) best of my recollection, I put my hand on his shoulder —that would be Mr. Long's. I told him to step to the car, and I believe I kept my hand on his shoulder; told him to put his hands on the top of the car. This would be at the—near the back window—

Q. Okay. Officer Lewis picked up the knife, then?

A. Yes, sir, at that time.

Q. Then did you look inside the front seat after Officer Lewis had picked up the knife?

A. Yes, I did.

Q. And how did you do that?

A. I walked—

Q. Did you have a flashlight in your hands?

A. Yes, I did. I walked to the open door of the car and shined my light inside the car.

Q. And did you see anything that caught your attention at that point?

A. There was some papers on the front floorboard. There was the—the vehicle's equipped with armrests. The armrests were down. They were located in the middle of the front seat. There was something underneath the armrest. I reached in and I lifted—let me clarify. The vehicle is equipped with a bench seat, not bucket seats, but bench seat. However, they are split. They are independent of each other. One, the driver's seat can move back and forth, and the passenger (134) seat can move back and forth, and both of them have an armrest. However, they are right together. One can be up or down or both can be up and down. They were both down. I reached and I lifted up the armrest—it would be on the driver's side.

Q. Before you lifted up the armrest, did you see something there?

A. That is correct.

Q. What could you see?

A. I could not be sure.

Q. What did it appear to be to you?

A. It appeared as though it may have been something leather. I could not tell. The armrests were all the way down.

Q. So, then you lifted up the armrest?

A. Yes, sir. It was sticking towards—it was sticking out a little bit on the driver's side, so I could see it. I lifted up that armrest on the driver's side. It was a leather-type pouch, longer than it was wide, if it was closed. The pouch was open. It was unfolded.

(At about 11:06 A.M.—Proposed PX 2 marked by reporter)

BY MR. FISHER:

Q. I show you what's been marked as People's Exhibit Number—Proposed Exhibit Number 2. Can you identify that?

A. Can I take it out of the bag?

(135) Q. Yeah.

A. Yes, sir. This is the bag—excuse me—this is the bag that was in the front seat of the car.

Q. That was open when you picked it up—or when you first saw it?

A. Yes, sir. It was unfolded.

• • •

Q. What did you see—did you see anything besides the pouch when you lifted up the armrest?

A. Yes, sir.

• • •

(137) • • •

Q. Now, Officer Howell, when you lifted up the armrest, did you see anything other than this leather pouch, which you've testified before?

A. Yes, sir. The leather pouch was underneath the armrest. This side would be towards the passenger side of the vehicle, and in this compartment, sticking out there, was a plastic bag, similar to a plastic sandwich bag, and there was a greenish-brown material, plant-like, I observed, suspected of marijuana.

Q. Have you ever seen marijuana before?

(138) A. Yes, sir, I have.

Q. How many occasions?

A. Many.

Q. Many?

A. Number-wise?

Q. Do you have an estimate?

A. Over a hundred.

Q. Have you ever smelled marijuana?

A. Yes, sir, I have.

Q. What did you do with the bag after you observed it?

A. After I observed it in the vehicle, I picked up the pouch, removed it from the vehicle, and I took the plastic bag out of the pouch.

Q. What did the contents of the bag look like to you?

A. They looked like marijuana to me.

Q. Did you open the bag?

A. Yes, sir, I did.

Q. Did you smell it?

A. Yes, sir, I did.

Q. What did it smell like?

A. It smelled like marijuana.

• • •

(139) BY MR. FISHER:

Q. Officer Howell, I'm handing you what's been marked as People's Proposed Exhibit Number 3. Can you identify that?

A. Yes, sir. This is the plastic bag which was in the leather pouch.

Q. What did you do with that—that bag after you removed it and looked at it and smelled it?

A. I removed at it—correction—I removed it and looked at it, asked my partner to look at it. I then put it back in the pouch, advised subject he was under arrest. I believe I stated, "You're under arrest for grass," my exact words. I then put the pouch—leather pouch containing the marijuana—suspected marijuana in my back pocket.

Q. And how long did it remain in your back pocket?

A. It remained in my back pocket until I gave it to Deputy Lewis at the Sheriff's Department.

Q. And how long after the—after the traffic stop was this?

A. I believe it was between two and two-thirty sometime.

Q. Was a field test performed on it by anyone?

A. Yes, sir. I observed a field test performed by Deputy Lewis.

Q. Where was that performed? At the Sheriff's Department?

A. That was performed at the front lobby.

Q. Of the Sheriff's Department?

A. It is not—it would be the office area, which is close to the lobby, where people can come in. It was in the office (140) area at the Sheriff's Department.

Q. Thank you. After you told the defendant he was under arrest, what did you do next?

A. At that time, I checked the interior of the vehicle for further contraband.

Q. What were you going to do with the car?

A. Impound it.

Q. Did you call a tow truck?

A. Later, I did.

Q. Did you do something with regard to impounding it before calling for a tow truck?

A. Yes. After checking the interior of the car, upon getting out, I observed that the ignition key was not in the ignition. It has a lock steering column, and the wheels were not straight. Also, it was in park, which is locked. I exited the

vehicle, walked back from where Deputy Lewis was standing with Mr. Long, back by the trunk—it would be on the side of the car near the trunk. I asked Mr. Long for the keys for the vehicle. He handed me a single ignition key. It was not on a ring. I then asked him if he had a key for the trunk and he stated, "I have no key."

Q. Did the trunk have a lock on it?

A. As I walked to the rear of the trunk, I observed that the trunk lock had been punched out. All there was was a hole. Also, there was two hand prints on the trunk, in the dust.

(141) Q. Did you—you say you opened—did you say you opened the trunk or—

A. Yes, I did.

Q. How did you open it?

A. I stuck my jackknife in the hole and tripped the latch.

Q. What was your reason for checking the trunk?

A. Okay. For—as I stated, we were going to call a tow truck We checked—I checked the vehicle for any type of valuables that a person we lodged may be claimed to be stolen from the vehicle. Also, for further contraband.

• • •

BY MR. FISHER:

Q. Officer Howell, there are two large bags here, which I'm not going to hand you to identify, but they're sitting on the floor here in front of you. They have been marked as People's Proposed Exhibits 4 and 5. Can you identify those objects?

A. Could I get off the stand and check them?

Q. Yes.

A. Yes, sir. Those bags were in the trunk of the vehicle.

Q. They are now split open Were they in that condition when you first saw them?

A. Yes, sir, exactly that condition.

Q. And did you see what the contents of the bag contained?

(142) A. Yes, sir. I shined my flashlight on them. They also appeared to be suspected marijuana.

Q. Did you smell it?

A. Pardon?

Q. Did you smell it?

A. Yes, sir, I did.

Q. What did it smell like?

A. Marijuana.

Q. What was done with these bags after you observed them in the trunk of the car?

A. Okay. The bags were left in the trunk of the car. We removed the subject to our vehicle, placed him in the vehicle. The wrecker was called. After the wrecker arrived, we followed the wrecker as it towed that vehicle to the Sheriff's Department.

Q. Was the trunk of the car opened or closed while the bags were taken into the Sheriff's Department?

A. It was closed.

Q. Was anything added or taken out of the bags before they got to the Sheriff's Department?

A. No, sir.

Q. What happened to the bags after they got—you got the car back to the Sheriff's Department?

A. Okay. Deputy Lewis—we have an underground garage at the rear of the building. The wrecker driver drove to that area. (143) I let Deputy Lewis out of the vehicle, asked him to secure the vehicle in the basement, and I would be down shortly. I then took Mr. Long to our security garage, took him inside and gave him to the booking officer and then met Deputy Lewis in the basement.

Q. Did anyone take samples from those bags that evening?

A. Yes, sir, Deputy Lewis.

Q. And where did the bags stay after the samples were taken?

A. The bags were—stayed in the trunk of the vehicle, which was locked in our garage downstairs.

Q. And were they transported from that car, then, after that, sometime?

A. Yes, sir. As soon as the Undersheriff arrived in the morning, the bags were turned over to him and locked in our evidence room.

Q. And did you observe the bags being locked in the evidence room?

A. Yes, sir, I did. I personally carried them in. The door was locked.

Q. When did you retrieve the bags from that room?

A. Yesterday, and then I took them back, turned them back over to the Undersheriff, and then I retrieved them this morning.

Q. Did you weigh those bags when you—

A. Yes, sir, I did.

Q. What was the weight of each?

(144) A. If I remember right the weight of both bags—they were weighed on a bathroom scales. The weight of both bags totaled between seventy and seventy-five pounds.

MR. FISHER: I have no further questions at this time, your Honor.

THE COURT: Mr. Jerkins, cross examination?

MR. JERKINS: Thank you, your Honor.

CROSS EXAMINATION
By Mr. Jerkins:

Q. Officer Howell, as I understand your testimony, you and Officer Lewis were on patrol on Norris Road. You were driving south. Now, were you on some kind of a call or were you just driving down that road at the particular time that this incident occurred?

A. I believe we were on our way to a complaint.

Q. We were what?

A. On our way to a complaint. In other words, somebody had called.

Q. All right. So, you were going somewhere to perform some sort of duty, correct?

A. Yes, sir.

Q. And as I understand your testimony, then this vehicle passed you going the opposite direction and you noticed on your radar that it was speeding?

A. That is correct.

(145) Q. All right. At that point, then, as I recollect your testimony, you stopped your vehicle, turned around and eventually saw this vehicle with a tire in the ditch?

A. Yes, sir. The front end was in a shallow ditch.

Q. All right. As I also understand your testimony, when you pulled up, that's when you first activated your overhead lights.

A. That is correct.

Q. All right. In any event, what that means, then, you weren't chasing the vehicle; you didn't have your lights on when you were chasing it or pursuing it. Is that correct?

A. I did not have my lights on when I was attempting—

Q. Your overhead lights, what's known as the flasher or overhead light.

A. When I was attempting to catch the vehicle, I did not have them on, no, sir.

Q. All right. When you approached the vehicle, I believe you stated that the individual got out of the driver's side and walked towards your vehicle; is that true?

A. He—as we pulled up—we would be facing the passenger side of the vehicle—he got out of the driver's side, which was away from us, and walked to the rear of his vehicle —his vehicle.

Q. Walked to the rear of the vehicle?

A. Yes, sir.?

(146) Q. All right.

A. That's where we met him.

Q. That's where you met him? In other words, he was walking towards you, then?

A. Well, he got to the rear of the vehicle and stopped before we got up to him.

Q. Right. Because you were walking towards him, then?

A. That is correct.

Q. All right. Now, after you had talked to him, you stated then he started back towards the vehicle and you started right behind him; is that correct?

A. Yes. I asked him for the registration and proof of insurance.

Q. Right. And it was at this point where you stated you saw Exhibit 1, which is a knife, on the floorboard; is that correct?

A. Yes sir, that's true.

Q. All right. Now, at that point, you stopped him, didn't you?

A. Yes, sir, that's true.

Q. All right. Now, at that point, you stopped him, didn't you?

A. Yes, sir.

Q. All right. And as you've testified, Officer Lewis, who was with you, picked up this particular knife off the floorboard; is that correct?

A. That is correct.

Q. Now, also on this floorboard in the car, you mentioned you saw some papers. And isn't it also true that there were other tools that were on the floor?

(147) A. No, sir.

Q. Well, did you see any tools in the car?

A. I believe in my testimony at District Court—

Q. No, I just asked you if you saw any; I didn't ask you what your testimony was.

A. To the best of my recollection, saying there may have been some in the back of the floorboard.

Q. So, you're saying there were some other tools, then, that were in the car, but you believe they were in the back seat floor area?

A. Possibly, yes.

Q. Pardon?

A. Possibly.

Q. All right. Now, at the time that you stopped him and Officer Lewis picked up the knife, isn't it also true that you told him to lean up against the car and you proceeded to search him?

A. Yes, sir. I had my hand on him.

Q. All right. And you searched him at that point, didn't you?

A. I frisked him, yes.

Q. And you were searching him to see if he had any weapons or anything on him, is that correct?

A. Yes, sir. I frisked him to see if he had any weapons.

Q. And you found none, is that correct?

A. That is correct.

(148) Q. All right. Now, after you did this, and after Officer Lewis had the knife, is it at this point that you then decided to search the vehicle?

A. Yes, sir. I wanted to look in the vehicle—

Q. All right.

A. —and see if there were any—

Q. All right. That's what you did, then. You actually shined your light and got in the vehicle, is that correct?

A. No, sir.

Q. Well, you entered the vehicle, didn't you?

A. No, sir.

Q. You didn't put your head in or your arms in at all?

A. I walked up to the open door of the vehicle.

Q. All right. Did you lean in?

A. Not until I had saw the pouch.

Q. Well, how could you see the pouch if it was under an armrest?

A. I knew after I lifted the armrest that it was a pouch.

Q. All right. In other words, you had to lift the armrest to even see the pouch?

A. Yes, sir, after I had shined my light on it.

Q. All right. So, when you looked inside the vehicle, you didn't observe anything, but then you started lifting the armrest and looking under things; is that true?

A. No, sir.

Q. Well, did you lift the armrest?

(149) A. Yes, sir.

Q. All right. Did you lift both armrests?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Why didn't you lift both armrests?

A. At that time, I did not, no, sir.

Q. Well, when did you lift both armrests?

A. I lifted the armrest on the passenger side after I had placed him under arrest.

Q. I see. Now, are you saying that the—the pouch was under the armrest which is on the driver's side?

A. Yes, sir.

Q. All right. Now, you've already indicated to the jury that you had testified previously concerning this, and this was at the preliminary examination; isn't that correct?

A. Yes, sir.

Q. And that was on the 22nd day of September, 1977; isn't that true?

A. I am not sure of the date, sir.

Q. Well, you don't quarrel with that date, do you?

A. Pardon?

Q. You don't quarrel with that date, do you?

A. Not at all.

Q. All right. In any event, it was about a month after this (150) incident when you testified at the District Court?

A. If it was in September, yes.

Q. All right. And this, today, now, is August of '78, which is a year after this incident; isn't that correct?

A. Yes, sir.

Q. Now, would you say that your memory as to what occurred on the date in question, which is August the 25th, 1977, that it was fresher when you testified in District Court more so than it is today?

A. Probably about the same, I guess.

Q. About the same? All right. Now, looking at your testimony, on Page 7 of the Preliminary Examination, do you remember this question and this answer?—and this is the prosecutor who's asking you questions.

A. Uh-huh.

Q. "Q. Now, the armrest wasn't open, but you say this leather pouch or whatever was open?

"A. Yes, sir, the armrest was down. When I lifted the armrest,—folded the armrest up, the pouch was open. It was unfolded and it was on the—would be towards the passenger's side of the vehicle."
Do you remember that testimony?

A. Yes, sir.

Q. All right. And is that correct, that testimony that you gave in September of '77?

(151) A. Yes, sir. The—

Q. All right. Thank you.

A. —pouch—

Q. Thank you, Officer.

Now, after you lifted the armrest and you saw the pouch, then you—which is this exhibit—Exhibit Number 2—it's at that point, then, when you say you then retrieved out of that plastic bag and there was a green substance which you believed to be marijuana, and you then arrested my client at that point; is that true?

A. Would you restate the question, please?

Q. All right. I'm not trying to confuse you. I'm just trying to get the facts out. It was after you took this pouch, Exhibit 2, which you say had in it the plastic bag with a substance which you believed to be marijuana—it was at that point, then, that you arrested my client?

A. After I removed the pouch from the vehicle and the bag from the pouch and examined it, yes.

Q. All right. Now, at no time did you arrest him, say, for having this knife in the car, did you?

A. No, sir, I did not.

Q. And isn't it also correct, that you did issue him a traffic citation for speeding?

A. Yes, sir, later on that morning.

Q. Later on that morning? And isn't it also true, that later on, (152) you then asked for that citation back and destroyed the citation for speeding?

A. No, sir, it wasn't destroyed.

• • •

Q. What happened to that citation for speeding?

A. That was taken back from Mr. Long at the request of the prosecutor and voided in reference to awaiting a decision.

Q. So, it was voided out; is that true?

A. Yes.

Q. All right. Incidentally, the license number on this car, do you recall what it was?

A. Tom-Henry-Henry-5 something. I would have to look at the report.

Q. Now, when you say Tom-Henry-Henry, you're referring to the letters T-H-H; is that correct?

A. That's right.

Q. How about T-H-H 581? Does that sound familiar?

(153) A. That may be it, yes, sir.

Q. Pardon?

A. That may be it, yes, sir.

Q. Okay. Do you want to look at anything to be positive or do you accept the fact?

A. Are you asking me?

Q. Do you accept that that is the number?

A. I'll go along with you.

Q. So, the license number was T-H-H?

A. If you want me to be positive, I should probably look at something.

Q. Pardon?

A. If you want me to be positive, I should probably look at something.

Q. Well, is it in the report that you gave the prosecutor Tom-Henry-Henry 581? So, is that the number?

A. To the best of my knowledge, right now, yes, sir.

Q. All right. And this was a '72 Mercury, did you say?

A. Yes, sir.

Q. Marquis Mercury?

A. Well, I believe it was a Brougham, to the best of my—

Q. Oh, I'm sorry.

A. A Brougham, to the best of my recollection. It was a two-door.

Q. It was a two-door? In any event, a '72 Mercury, as you (154) recall. You're not quite sure what it was, other than a '72 Mercury?

A. It was a full-sized car, two-door.

Q. Okay. Fine. Now, incidentally, you did search Mr. Long, and did you ever find any other car keys to this particular car?

A. Are you talking about after he was arrested—placed under arrest and he was searched?

Q. Yes, uh-huh.

A. He was again frisked after he was placed—when we took him back to the cruiser, we frisked him again, I believe. Upon taking him to the Sheriff's Department, I turned him over to the booking officer, then went down with Deputy Lewis. I do not recall positively if there was any other keys or not.

Q. All right. In any event, you did ask him for the keys to the car and he gave you one key, which was the ignition key, right?

A. That is correct.

Q. All right. Did he also tell you he didn't have a trunk key?

A. He didn't say anything. I asked him if there was a trunk key and he stated, No, he didn't have one.

Q. He stated, no, that there was no trunk key?

A. Yes, he stated, "No, I don't have one."

Q. "No, I don't have one"? That's what he said. All right.

MR. JERKINS: Nothing further.

THE COURT: Redirect?

(155) REDIRECT EXAMINATION
By Mr. Fisher:

Q. Officer Howell, when you first shined your flashlight into the car, before you lifted the armrest up, did you see anything on the front seat?

A. Other than what I saw something on the armrest.

Q. You saw something what?

A. Under the armrest.

Q. Under the armrest?

A. Yes. I didn't observe anything else.

Q. What was that that you saw under the armrest before lifting it?

A. I couldn't tell for sure.

Q. What did it turn out to be after you lifted up the armrest?

A. It turned out to be the pouch.

Q. You could see a corner of it or something?

A. Yes, sir.

Could I have the pouch back, again, please?

Okay. Okay. The pouch—the pouch was lying thusly. (Indicating) This would be the front of the car. This would be the back of the front seat. The armrest was down, like this. I could see something under the edge of the armrest. I lifted the armrest up. It was lying thusly, this side on the driver's side, this side toward the passenger side.

(156) Q. Okay. You could see the edge of it, then, the long side of the pouch?

A. Yes, this side here. (Indicating)

Q. Okay. And when you testified at the preliminary exam that the pouch was towards the passenger side of the vehicle, what did you mean by that?

• • •

A. I think, as I previously stated today, it was lying thusly. (Indicating) The marijuana was in the side of the pouch toward the passenger side of the car.

Q. Was the arm—

A. So, when I looked in—

Q. Okay. Was the other armrest, the one that's on the passenger side, is that right next to the armrest that's on the driver's side?

(157) A. That's correct.

Q. Was part of that armrest on top of the pouch?

A. Yes, sir, it was approximately covering half of this side of the pouch.

Q. Thank you.

MR. FISHER: Thank you. I have no further questions.

THE COURT: Recross examination, Mr. Jerkins?

RECROSS EXAMINATION
By Mr. Jerkins:

Q. In any event, Officer, do I understand that before you went into the vehicle and lifted the armrest, that Mr. Long was outside of the car?

A. Yes, sir. He was back probably behind the rear wheel.

Q. So, he was, from this door, approximately what? eight, ten feet away from the driver door?

A. Probably at least—at least three.

Q. All right. At least three. Was Officer Lewis right next to him?

A. I can't be sure—an assumption on my part.

Q. Well, Officer Lewis was there, wasn't he?

A. Right, but I didn't watch Officer Lewis all the time. I was—

Q. All right. You were between my client, Mr. Long, and the vehicle; is that correct?

A. No.

Q. Well, weren't you by the doorway?

(158) A. Yes. Mr. Long was right next to the side of the car.

Q. All right. But towards the rear of the car?

A. Yes, sir, that's correct.

Q. And that is a two-door car, is that correct?

A. Yes, sir.

Q. So the only way he could get in that passenger—or the driver's side would be to go around you?

A. To get into it?

Q. Yes.

A. I suppose he could slide by me. He would have to come in very close proximity to me, yes.

Q. Well, you're in between he and the seat of that particular car?

A. I am right beside the seat.

Q. I understand that.

A. Beside the open door.

Q. Officer, I'm not trying to confuse you. I'm just trying to position you in relation to him.

A. I was standing by the open door.

Q. All right.

A. That's the best I can say.

Q. All right. So, you were by the door, so that he's by the rear of the car and he's at least—from your testimony—three feet back from that door?

A. Yes, sir. He was back there.

(159) Q. And there was another officer present, isn't that true?

A. That is correct.

Q. And you've already searched Mr. Long and found that there was no weapons on him, isn't that true?

A. I frisked him.

Q. Well, frisked him, searched him, is there any difference?

A. Yes, sir.

Q. There is?

A. Yes, sir.

Q. You mean, that when you frisk, you're not looking for weapons? Is that what you're telling this jury?

A. I am looking for weapons.

Q. All right. And you found no weapons, isn't that true?

A. But I didn't search him.

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(160) • • •

DIRECT EXAMINATION
By Mr. Fisher:

(161) Q. State your name, please.

A. Ricky Arnold Lewis.

Q. What's your occupation, Mr. Lewis?

A. I'm a Deputy Sheriff at the Barry County Sheriff's Department.

Q. And how long have you been employed at the Barry County Sheriff's Department?

A. Approximately four years.

Q. Have you worked there during that entire four-year period?

A. Yes, sir, with the exception of the assignment I was on —special assignment.

Q. What special assignment was that?

A. I was assigned to the Regional Crime Unit.

Q. And what is that?

A. It's an organization made up of five different counties where myself, along with other officers, were assigned for undercover narcotic work in a five-county area.

Q. And when were you employed on this special assignment as an undercover narcotics agent?

A. February of '76 through July of '77.

Q. Thank you. Were you on duty as a Deputy Sheriff here in Barry County last August 25th, 1977?

A. Yes, sir, I was.

Q. Who were you working with?

A. I was working with Deputy Howell.

Q. And what was your shift that day?

(162) A. It was eleven at night 'til seven the following morning.

Q. Do you remember where you and Officer Howell were shortly after midnight on August 25th?

A. Yes, sir, I do.

Q. Where were you?

A. We were heading north—or heading south on Norris Road.

Q. In a patrol car?

A. Yes, sir.

Q. Was that patrol car equipped with radar?

A. That's correct.

Q. Was there much traffic on the road that morning?

A. No, sir, there was not.

Q. Did your radar indicate a speeding car at some point during that morning?

A. Yes, sir, it did.

Q. About what time was that, approximately?

A. About five minutes after twelve.

Q. What—how fast did the radar say the car was going?

A. Seventy-one miles an hour.

Q. And was that car headed in the same direction as your patrol car?

A. No, sir. It was headed north. We met the vehicle.

Q. What did you do after you—well, let me ask you this, first. Is the car, when it passed you, were you able to tell what type of car it was?

(163) A. No, sir.

Q. Could you tell how many people were in the car?

A. No, sir.

Q. Did you look around at the car as it went past?

A. Yes, sir, I did.

Q. Anything unusual about it as you turned around?

A. The only thing that I noticed, it was possibly a dark green vehicle. It had one of the red lenses on the taillight was broken out and it showed a white light to the rear.

Q. Who was driving the car—your car, I should say?

A. Deputy Howell was driving the cruiser.

Q. And what did he do after his car went past you?

A. He then turned around and attempted to go after the vehicle.

Q. And how long did he follow the car?

A. Approximately five minutes or so.

Q. Did it ever get out of your sight?

A. Yes, sir, it did.

Q. How many times?

A. I don't know. There was several hills and curves in the road.

Q. Was it ever out of your sight for—Well, let me put it this way. What was the longest period of time, if you can estimate, that it was out of your sight?

A. A matter of fifteen, twenty seconds.

Q. Did you have occasion to stop this car or come in contact (164) with the driver of the car?

A. Yes, sir, we did.

Q. How did that happen?

A. The vehicle turned on—made left-hand turn off Norris Road onto Mullen Road, at which time the vehicle ended up with the front wheels of the vehicle in the ditch. We then went to the—

Q. Now, let's stop right there for a minute. When you—did you pull up behind the car, then, or what?

A. We pulled up—the vehicle was in the ditch. We pulled up to the side of it.

Q. And did you observe anyone in or outside of the car?

A. Yes, sir, we did.

Q. And where—how many people did you see?

A. We saw one person.

Q. And where was that person?

A. He was sitting in the front seat on the driver's side of the vehicle.

Q. And did you have some contact with that person a few moments after you got out of your car?

A. Yes, I did.

Q. Do you see that person in the Courtroom?

A. Yes, sir, I do.

Q. Would you point him out, please.

A. He's the gentleman in the Courtroom in the gray suit, glasses, (165) and ear-length hair.

Q. Seated at the defendant's table?

A. Yes, sir.

Q. Thank you. What did the defendant do as you pulled up next to his car?

A. He then got out of the vehicle and walked up towards the back of his vehicle.

Q. What kind of a car was it?

A. I believe it was a Mercury.

Q. Was he asked to produce his driver's license by Officer Howell?

A. Yes, sir, he was.

Q. And did he produce it?

A. Not the first time.

Q. Did he produce it the second time?

A. Yes, sir. He was asked again. Then he produced his driver's license.

Q. Did Officer Howell also ask him for registration or proof of insurance?

A. Yes, sir he did.

Q. And what did the defendant do when he was asked for this?

A. He then turned around and started walking towards the front of the vehicle. The driver's door was open. He started walking towards the vehicle.

Q. And what happened at that point?

(166) A. At that time, myself and Deputy Howell spotted a folding knife laying next to the front seat, between the front seat and the open door. He was then told to stop, at which time he did, and myself—I retrieved the knife.

Q. This has been admitted as People's Exhibit Number 1. Can you identify that?

A. Yes, sir, I can.

Q. What is it?

A. It's a folding knife which was lying between the front seat and the driver's door of the vehicle.

Q. The one you've just testified about?

A. Yes, that's correct.

Q. Was it opened or closed when you saw it on the seat?

A. It was closed.

Q. Okay. Thank you. What did you do after you observed the knife?

A. I then picked the knife up.

Q. Where was Officer Howell at this time?

A. He was standing behind me by Mr. Long.

Q. Where was Mr. Long with relationship to Officer Howell as you grabbed the gun—excuse me—as you grabbed the knife?

A. He was back towards the rear of the vehicle by the back door or—

Q. Was he behind the defendant or in front of him, with relationship to the front door?

(167) A. I don't recall exactly where Deputy Howell was standing.

Q. After you picked up the knife, what did Officer Howell do then?

A. He then asked Mr. Long to put his hands on the roof of the car, at which time Deputy Howell patted him down to make sure he was not carrying any more weapons.

Q. Did he find more weapons?

A. No, sir.

• • •

Q. What did you do while Officer Howell was frisking the defendant?

A. I picked up the knife and I returned back to where Deputy Howell and Mr. Long were at, towards the rear of the vehicle.

Q. What did Officer Howell do then? Did you observe him?

A. Yes, I did.

Q. What did he do then?

A. After he patted Mr. Long down, he then went to the open door of the vehicle and looked inside.

• • •

(168) • • •

Q. What did he do after he looked in the front seat?

A. He then looked in the front seat. He then come back out of the vehicle and came over to where myself and Mr. Long were standing.

Q. Where was that?

A. Towards the rear of the vehicle.

Q. Did he have anything with him when he returned back?

A. Yes, sir, he did.

Q. What did he have?

A. He had a brown pouch that appeared to be something like a billfold.

Q. I'm handing you what's been marked as People's Exhibit Number 2. Can you identify that?

A. Yes, sir, I can.

Q. What is it?

A. It's the pouch that Deputy Howell removed from the front seat of the vehicle.

Q. Thank you.

• • •

(171) • • •

Q. Mr. Lewis, I believe we broke off where we were discussing the pouch that's been introduced here as People's Exhibit Number 2, and I believe you indicated that you did see it on that morning in question; is that correct?

A. That's correct.

Q. Now, did Officer Howell—what did—did he bring this back to you or what?

A. He—

Q. Did he show it to you?

A. He showed it to me at that time.

Q. Where were you standing when he showed it to you?

A. I was standing with Mr. Long towards the rear of the vehicle.

Q. Could you see if it contained anything?

A. Yes, sir. Deputy Howell showed me that it did.

Q. What did you see?

A. It contained a plastic bag with brownish-green plant-like material, which we suspected to be marijuana.

Q. Have you ever seen marijuana before?

A. Yes, sir, I have.

Q. Approximately how many times?

A. Approximately well over a hundred times.

(172) Q. Have you ever smelled it?

A. Yes, sir.

Q. Did you examine the contents of this baggie?

A. Yes, sir.

Q. What did it look like?

A. It looked to me like it was marijuana.

Q. Did you smell it?

A. Yes, sir.

Q. What did it smell like?

A. It smelled to me like it was marijuana.

Q. I'm showing you what's been marked as People's Proposed Exhibit Number 3. Can you identify it?

A. Yes, sir, I can.

Q. What is it?

A. It's a plastic baggie containing a brownish-green plant-like material.

Q. Where have you seen it before?

A. It's the plastic baggie that was found in the pouch.

Q. Thank you.

• • •

Q. What did—what happened to the pouch after you examined it (173) and Officer Howell examined it?

A. He then closed the pouch up, and I believe he placed it in his back pocket.

• • •

Q. What were the results of the field test?

A. I got a positive reaction on the field test for marijuana.

• • •

(174) • • •

Q. Now, back out at the—out on the road where the car was in the ditch, did Officer Howell or yourself look into the car in any areas other than the passenger compartment?

A. Deputy Howell looked in the front seat and he also looked in the trunk of the vehicle.

Q. Did you look in the trunk in the car?

A. Yes, sir. When he opened the trunk, I looked in it, also.

Q. What did you observe in the trunk of the car, if anything?

A. Two large bags full of brownish-green plant-like material in (175) the trunk of the vehicle.

Q. Did you have any idea what might be in the bag?

A. From the looks of it, it appeared to me to be marijuana.

Q. Were the bags opened or closed when you first saw them?

A. They were opened. They looked like they'd been cut with a knife.

Q. Here on the floor we have two large bags which have been marked as People's Proposed Exhibits 4 and 5. Can you identify those?

A. Yes, sir, I can.

Q. What are they?

A. They're the two large bags of suspected marijuana that were found in the trunk of the vehicle.

Q. Did—did you smell the contents of each bag?

A. I looked at it and I also smelled of it, yes.

Q. What did it smell like?

A. It smelled to me like it was marijuana.

Q. What happened to the car and the bags—well, let me back up for a minute. Was the defendant arrested that evening?

A. Yes, sir, he was.

Q. What happened to the car and the—those two large bags in front of you after the defendant was arrested?

A. The bags were left in the trunk of the vehicle and a wrecker was called to have the vehicle towed to the Sheriff's Department.

(176) Q. And what happened to the car and the bags when you got back—well, let me ask you this. Was there—did a wrecker come to the scene?

A. Yes, sir.

Q. What did the wrecker do with the car?

A. He pulled it out of the ditch. He then hooked it up to tow it to the Sheriff's Department.

Q. And what did you do while the wrecker was towing the car in?

A. I stood there with the vehicle, stayed with the vehicle.

Q. What were you doing while the tow truck was pulling it into the Sheriff's Department?

A. Myself and Deputy Howell were transporting Mr. Long to the Sheriff's Department. We followed the wrecker in our vehicle directly behind it.

Q. You were right behind the car all the way in?

A. That's correct.

Q. What happened to the car and the bags when you got back to the Sheriff's Department?

A. It was taken to the—behind the Sheriff's Department, at which time I got out of the police car. I opened the garage door and directed the wrecker driver to put the vehicle inside the garage at the Sheriff's Department.

Q. What was done with the bags when you got them inside the garage?

A. The bags were left in the trunk of the vehicle for a period (177) of time.

Q. How long?

A. Approximately four or five hours.

Q. Was the trunk locked at this time or closed?

A. Yes, sir, the trunk was closed.

Q. Were any samples taken out of these bags?

A. Yes, sir, there was.

Q. When were those samples taken out?

A. They were taken out upon our return to the Sheriff's Department. The vehicle was put in the basement. The trunk was then opened again, the samples were taken, and the bags were left in the trunk.

• • •

(178) • • •

Q. Did you perform any field tests on the contents of the large bags?

A. Yes, sir, I did.

• • •

Q. What sort of test is this field test that you perform?

A. It's a narcotics test kit that we have at the office. It contains plastic containers with vials of chemicals in the plastic containers. You put some—some suspected controlled substance in a plastic container. You break the vial. If (179) it turns a certain color, it's supposed to be positive for the controlled substance.

Q. Have you been trained somewhere in the use of this drug—drug testing kit?

A. Yes, sir, I have.

Q. Where was that?

A. I was shown how to do it in recruit school; also, when I worked for the Regional Crime Unit, and also when I went to the narcotics school sponsored by the U. S. Department of Justice.

Q. And what color is the substance supposed to turn if it's marijuana?

A. It's supposed to turn from a bluish to a purplish, somewhere in that vicinity.

Q. And what color did the samples that you took out of the bags turn after you broke the vial?

A. It turned to a purple color.

• • •

(181) • • •

Q. How would you describe the defendant's demeanor when you confronted him on the roadway that evening?

A. I would describe it as he was unsteady, disoriented, didn't exactly know what, for sure, was going on.

• • •

CROSS EXAMINATION
By Mr. Jerkins:

Q. Would you say he was scared, nervous?

A. That's possible, yes.

Q. By the way, what is the speed limit on Norris Road?

A. It's 55 miles an hour.

Q. And the car that Mr. Long was driving was going 71, is that correct?

A. That's correct.

Q. That's 16 miles over the speed limit.

A. That's correct.

Q. Now, after he was out of the car, and you say you and Officer Howell saw the knife—

A. That's correct.

Q. —Officer Howell then told Mr. Long to stop, and he (182) cooperated, didn't he?

A. Yes, sir.

Q. In effect, he cooperated all the time he was there with you, didn't he?

A. That's correct.

Q. All right. He then was searched, as you already told us, for weapons. None were found on him. The knife was retrieved, right?

A. He was patted down, yes.

Q. Same thing, patted down meaning looking for weapons or anything; is that correct?

A. That's basically correct, yes, sir.

Q. All right. Now, did you notice the jumper cables and the screwdriver and hammer and other tools that were in the car on the floor?

A. I believe I recall them in there, yes.

Q. You do recall them there?

A. Yes, sir.

Q. All right. In fact, the car was sort of messy, wasn't it? a lot of tools and papers and things—

A. Yes, sir.

Q. —were in the inside of it; isn't that correct?

A. That's correct.

Q. All right. Now, after he had been patted down, as you call it, for weapons, and the knife had been picked up off the (183) floor—in fact, nobody picked up the hammer or the screwdriver, did they?

A. No, sir.

Q. In any event, after the knife was picked up, Mr. Long was still outside the car and was still towards the rear of the car by you, wasn't he?

A. That's correct.

Q. And Officer Howell then proceeded to search the car, isn't that correct?

A. He looked into the vehicle, yes.

Q. All right. He was looking around, lifting things and looking, wasn't he?

A. I can't testify to what he was doing because I couldn't see what he was doing in the vehicle.

Q. In any event, you knew he was inside the car doing something.

A. That's correct.

Q. And you also knew that there was no way that Mr. Long was going to get into the car at that point, isn't that true, because you had him by you under your control?

A. That's correct.

• • •

(188) • • •

THE COURT: Do you have any further argument over the admission of the exhibits?

• • •

(189) MR. JERKINS: • • •

I would also point out that my other argument is, is that based on the testimony we have heard here today, there is no question but what there is an illegal search and seizure of this vehicle, the testimony clearly shows, and it's more conclusive and more favorable to the defendant than the preliminary examination testimony. It clearly shows that Mr. Long was outside of the vehicle, that he was under the control of Deputy Lewis, that he had been searched for weapons. No weapons were found. That the only item that was found, and he was never charged with any violation of law concerning it, was a knife which was among other tools that were in the car that had already been secured. At that point, there was no threat to either officer's well-being as (190) far as issuing a speeding violation ticket to Mr. Long. That's all they had to do at that point was issue that ticket. They had no basis in law or anything else to search that vehicle at that point since he wasn't even within an arm's length of getting into that vehicle, which is clearly, under the Shmiel Doctrine, you can search within an arm's length. He wasn't even there within that arm's length, and Officer Howell was in the doorway of the vehicle, so that would be impossible for Mr. Long to get in there to try to do anything. And, as Officer Lewis testified, he had him under his control. So, clearly, there was no necessity to search the vehicle other than to search it improperly and illegally under the law. And we start with the presumption that any warrantless search has to fall within an exception in order to be permissive. That in this instance, there is nothing that creates that exception. There's nothing shown.

• • •

(191) • • •

MR. FISHER: With regard to the search, I think the—the key point to remember in that regard—to the search of the front seat, anyway, is that this is a Terry-type of search. The reason for that exception to the warrant requirement is (192) that that source of limited intrusion is necessary to protect the officers' safety. The officers testified that when they asked the defendant for his registration and proof of insurance, that he started to go toward the open door of the car. When they followed him to the car, they saw the knife lying on the front seat, and I believe that this limited source of intrusion into the front seat to see if there were any more weapons there were fully justified under the situation we have here. Thank you.

THE COURT: Anything further, Mr. Jerkins?

MR. JERKINS: Just to clarify a misstatement. I'm sure Mr. Fisher didn't intend it, but the knife was found on the floor, not on the seat.

MR. FISHER: That's what I meant to say, your Honor.

• • •

(193) THE COURT: • • •

Now, as to the other argument you had, Mr. Jerkins, about all of the evidence should be excluded because it was an illegal search, this Court is satisfied from the evidence that this Court has heard that Mr. Howell saw a knife and it was a large knife. And the fact is, I think he called it a weapon, or Mr. Jerkins called it a weapon. But, anyway, I heard the word weapon used here today, and that upon seeing that, he stated that he frisked the defendant. He stated that the defendant was some three feet from him, as I remember. Is three feet the length of that gentleman's arm? The Court is not quite sure. But I think that he was within an arm's length, and the Court will so hold that.

Now, there's no question about it that Mr. Lewis said something about that he had the defendant under his control. However, there is nothing to indicate that Mr. Howell—at least from the testimony I've heard, there's nothing to indicate that Mr. Howell knew that the defendant was under the control of Mr. Lewis. The fact is, as I remember the testimony, Mr. Howell said he didn't know where Mr. Lewis was. I'm satisfied from the proofs that have been submitted that Mr. Howell had a right to make a search for weapons, and in doing so, he uncovered something that appeared to be marijuana and this defendant was placed under arrest, and thereupon, there was a search made of the automobile. (194) This Court concludes that it was an inventory search and the proposed Exhibits 4 and 5 were found. So, the Court's concluding that it was not an illegal search and seizure.

Your motion is denied, Mr. Jerkins, and Exhibits 4, 5, 6, and 7 are admitted.

• • •

(196) • • •

MR. JERKINS: Your Honor, at this time, I would move for a directed verdict of acquittal because all we have at this particular juncture is, in the testimony most favorable to the prosecution, we have Mr. Long in the motor vehicle, apparently, as the driver of the motor vehicle. We—and no mention of any connection of Mr. Long to any of the exhibits. There is nothing at all to show that he had knowledge of the marijuana. There is nothing to show at all that had anything to do in the trunk. In fact, there's evidence quite to the contrary, because it's already come out that he did not have a key to the trunk. There's nothing at all to indicate that he had any access or knowledge of that. There's nothing at all that indicates he had any knowledge as to any pouch underneath the armrest, and in fact, there's nothing here at all to even show that this is his vehicle, that this is his car. There's nothing at all that is there, other than his mere presence in a motor vehicle, as the driver. And under the law, as the Court's well aware, mere presence is not sufficient. There has to be something to show his knowledge. There has to be something to show that he had control or dominion over the items which are the subject (197) matter of this lawsuit. That is totally devoid, so there is absolutely nothing. The jury would be left to speculate at this point as to whether or not he had anything to do with the marijuana in this instance. I submit there is even no questions asked of him by the officers about the marijuana. They didn't even try to talk to him about it. They didn't ask him if this was his pouch or anything, which I find utterly—well, surprising to me that they didn't say to him, "Is this your pouch?" or anything. True, he doesn't have to answer, but they didn't even make the inquiry to find out to see if he'd say, "Yes," "No," or whatever. Just nothing. And I submit, your Honor, that the mere presence of Mr. Long in that vehicle does not establish knowledge or control or dominion over these exhibits, and therefore, on that basis,

since the prosecution has to submit evidence that he knowingly possessed, that he had this control over these items, there is nothing there. Therefore, it does require a directed verdict.

THE COURT: Thank you.

Mr. Fisher?

MR. FISHER: Yes, your Honor. I believe that we have established sufficient facts on the record to justify the—a logical inference on the part of the fact-finder that the defendant did have the required knowledge for these reasons: The pouch that was found was visible to Officer (198) Howell, who was standing outside the passenger—or excuse me—the driver's side of the car. He could see the edge of the pouch sticking out from underneath the armrest. That's right next to where Mr. Long was sitting when he was driving the car. When the armrest was lifted up, the pouch was wide open and there was the marijuana sitting right out—sitting there.

On top of that, Officer Lewis testified that Mr. Long's demeanor, upon confronting him, he seemed to be confused or disoriented. I believe that the—taken as a whole, these facts are sufficient to allow the fact-finder to infer that Mr. Long knew that the marijuana was there and knew what it was. Thank you.

THE COURT: Anything further, Mr. Jerkins?

MR. JERKINS: Only that I've heard nothing that indicates that there is any fact, other than speculation for the jury, to show knowledge or control or dominion over the marijuana. It's not there.

• • •

(199) THE COURT: • • •

The Court's had the benefit of the advice of counsel in chambers while we were examining the law in regard to Mr. Jerkins' motion. The Court has had the benefit of *People* v *Ridgeway* presented to it, and there is a statement in *People* v *Ridgeway*: "The presence in or control over a vehicle in which the substance is found is evidence of possession."

With that in mind, the Court will deny your motion, Mr. Jerkins.

Return the jury, please.

• • •

I am now going to present, by Secretary of State records and documents, the ownership of that car to show you that this was not a car on this date that was owned by my client but owned by another person, a William Brake. We have two documents, which we will offer, showing that the title of that vehicle and the license of that vehicle indicate that that vehicle was not owned by my client, and at the conclusion of the admission of those, that will conclude our case, and then we will argue the case and the law will be given to you. Thank you.

At this time, your Honor, I would offer into evidence, under the Great Seal of the State of Michigan, two documents pertaining to the License Number T-H-H 581, as well as (201) a Certificate of Title for a 1972 Mercury two-door vehicle.

• • •

Your Honor, Defendant's Exhibit 8 is from the Secretary of State, and it shows that—it's dated the 24th day of August, 1978—and it shows that the title to this automobile was not —the name of William D. Brake, and attached to this certificate is a copy of the Application for Certificate of Title, which shows that the vehicle was transferred to a William Brake on the 24th day of June of 1977, which is some eight months before this incident, and that the title still remains with William D. Brake.

Defendant's Exhibit Number 9, from the Secretary of State, shows that as of August 24, 1978, that the application for 1977 license T-H-H 581 was issued to a William D. Brake and that it still remains issued to William D. Brake.

• • •

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF BARRY

PEOPLE OF THE STATE OF MICHIGAN -vs- DAVID KERK LONG, Defendant.	File No. 78-100-FY

JUDGMENT OF SENTENCE

(Filed October 3, 1978)

At a session of said Court held in the Circuit Courtroom, in the City of Hastings, said County, Michigan, on September 15, 1978.

PRESENT: Honorable Hudson E. Deming, Circuit Judge.

OFFENSE CHARGED: Possession of Marijuana

DEFENDANT'S PLEA: Not Guilty

VERDICT OF JURY X OR COURT: Guilty of Possession of Marijuana

DEFENDANT'S ATTORNEY: Joseph Jerkins

SENTENCE OF COURT: Placed on probation for 2 years. Fine of $750.00; Court Costs of $300.00; payable $50.00 per month commencing 1 month from today. Appeal Rights given.

RECOMMENDATIONS:

DATE OF SENTENCE: September 15, 1978

HUDSON E. DEMING /s/
Circuit Judge

The opinions of the Michigan Supreme Court, reported at *People* v *Long*, 413 Mich 461, ... NW2d .... (1982), and of the Michigan Court of Appeals, reported at 94 Mich App 338; 288 NW2d 629 (1979) were printed in the Petition For Writ of Certiorari.

Office - Supreme Court, U.S.
FILED
SEP 10 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-256

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner

-vs-

DAVID KERK LONG,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Michigan Supreme Court correctly decided that a warrantless search of a traffic violator's car violated the state and federal Constitutions.

II. Whether the Michigan Supreme Court correctly decided that evidence discovered in a search undertaken because of evidence obtained by unlawful police action should have been suppressed.

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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1982

No. 82-256

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner

-VS-

DAVID KERK LONG,
Respondent

ON PETITION FOR
A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF MICHIGAN

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Michigan Court of Appeals opinion (Petition App. 35) is reported at 94 MichApp 338; 288 NW2d 629 (1979). The Michigan Supreme Court judgment (Petition App. 8) is reported at 413 Mich 461; 320 NW2d 866 (1982).

JURISDICTION

The Michigan Supreme Court judgment was entered June 14, 1982. The Petition for a Writ of Certiorari was filed August 13, 1982. The jurisdiction of this Court is invoked under 28 USC §1257(3).

STATEMENT OF FACTS

On August 25, 1977, two Barry County, Michigan, Sheriff's deputies pursued a speeding car (PT 4, 16-18; Tr 126-8*). After a short pursuit, the car swerved and stopped with its front in a shallow ditch, its back on the roadway and its driver's side toward the deputies (PT 4, Tr 129-30, 145, 164-5). David Long, the only occupant of the car, left the driver's seat and met the deputies at the rear of the car (PT 5, 19, 46; Tr 130, 145-6). Although Long appeared unsteady, disoriented and "under the influence of something" (PT 20; Tr 181), he was cooperative at all times (PT 19; Tr 181-2) and produced his driver's license after being asked for it twice (PT 5, 47; Tr 130-1).

Long was asked for the registration and proof of insurance of the car (PT 47; Tr 131). Without speaking, he walked toward the open driver's door (PT 47; Tr 131). The deputies then saw, and retrieved from the floor of the car, a large, closed folding knife (PT 6, 26, 48; Tr 132-3, 165-6). No claim was made that the "buck" knife was contraband. The Defendant was not charged with a weapons offense (PT 35; Tr 151; *People* v *Long*, 413 Mich 461, 469 n.1; 320 NW2d 866, 868 n.1 (1982); see MCLA 750.227; MSA 28.424). Long was frisked after the knife was seized. Although no weapons were found (PT 6, 23, 48-9, 159, 167), one of the deputies then held him while the other searched the interior of the car, ostensibly for weapons (PT 6, 27; Tr 133). The car's registration may have been found at this time (PT 50). The deputies said they searched the interior of the car for weapons because they were going to permit Long to get in to retrieve the registration (PT 8, 28). They thought the registration was in the glove box (PT 34). They acknowledged that no search would have been needed if they had asked Long where the registration was and retrieved it themselves (PT 34).

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* "PT" references are to pages of the transcript of the preliminary examination. "Tr" references are to pages of the trial transcript.

Although tools, including a hammer and screwdriver, were scattered about the "messy" car (PT 21; Tr 147, 181), the search for weapons was concentrated on a leather object which protruded slightly from beneath a folded-down armrest (PT 6-7; Tr 133-4, 148). Deputy Howell lifted the armrest and removed a leather, pocket-sized wallet. He removed the wallet from the car and opened it to take out a plastic bag containing marijuana (PT 6-7; Tr 134-5, 139, 168, 173).

Long was arrested for possession of marijuana (PT 8; Tr 139). Deputy Howell then searched the car for other contraband (Tr 140). The Defendant did not have a key to the trunk of the car, (PT 9, 132; Tr 140), so one of the deputies forced the keyless latch with his pocket knife and found two bags containing approximately 75 pounds of marijuana (PT 10, 13, 32-3; Tr 140-1, 144).

Deputy Howell searched the trunk to see if there was contraband in it and because he had a *personal* policy of checking for valuables in cars that he intended to impound, testifying that "we do not have an inventory search" in the Sheriff's Department (PT 10-11; Tr 141).

The car was towed to the Sheriff's garage where it was left overnight with the marijuana in it (PT 14, 51-2; Tr 142-3, 176-7). No written inventory was produced at trial and the deputies could not testify precisely about the car's contents (PT 22; Tr 146-7, 182).

Long moved at various stages of the proceedings to suppress the marijuana obtained in the searches of the car. The prosecution never attempted to justify these searches as "probable cause" searches. *People* v *Long*, 413 Mich 461, 472, 481 n.2; 320 NW2d 866, 869-70, 873 n.2 (1982). It sought to justify the initial search of the vehicle as a protective search under *Terry* v *Ohio*, 392 US 1 (1968), and the search of the trunk as an inventory search under *South Dakota* v *Opperman*, 428 US 364 (1976).

Long was convicted of possession of marijuana and appealed. His conviction was affirmed by the Michigan Court of Appeals, which called the issues close and "factually oriented." *People* v *Long*, 94 MichApp 338, 341; 288 NW2d 629, 630 (1979). The Michigan Supreme Court reversed the conviction because the facts of this case did not come within the narrowly-drawn exceptions to the warrant requirements of the state and federal Constitutions. Since the trunk search was made because of evidence found in the search of the car's interior, the evidence found in the trunk was suppressed as "fruit of the poisonous tree." *Wong Sun* v *US*, 371 US 471 (1963).

REASONS FOR DENYING THE WRIT

I. THE MICHIGAN SUPREME COURT DECISION IS SUPPORTED BY AN ADEQUATE STATE GROUND.

The Michigan Supreme Court grounded its decision on both the state and federal Constitutions. See *People* v *Long*, 413 Mich 461, 471 n.4, 473; 320 NW2d 866, 869 n.4, 870 (1982). Michigan has looked to federal case authority in its analysis of state constitutional questions. However, because of differences in the wording of the state and federal constitutional prohibitions of unreasonable searches and seizures, the Michigan Supreme Court has "imposed a higher standard under the state provision than the federal when the item seized is not one within the proviso of the third sentence of art 1, §11" of the state Constitution. *People* v *Secrest*, 413 Mich 521, 525; 321 NW2d 368, 369 (1982). See also *People* v *Nabers*, 103 MichApp 354, 375; 303 NW2d 205, 214 rev'd on other grounds 411 Mich 1046; 309 NW2d 187 (1981); *People* v *Wallach*, 110 MichApp 37, 70 n.8; 312 NW2d 387, 403 n.8 (1981); and *People* v *Chernowas*, 111 MichApp 1, 4; 314 NW2d 505, 507 (1981).

The proviso of the third section of art 1, §11 of the Michigan Constitution prohibits application of the exclusionary rule to, among other things:

"Any narcotic drug . . . seized by a peace officer outside the curtilage of any dwelling house . . ."

People v *Moore*, 391 Mich 426; 216 NW2d 770 (1974), cited at page 5 of the Petition, deals with this proviso. Neither the proviso nor *Moore* applies to this case. Michigan has a statutory definition of "narcotic drug" which does not include marijuana. See MCLA 333.7107; MSA 14.15(7107).

Examples of the greater protection afforded by the Michigan Constitution abound.

The Michigan Constitution prohibits warrantless participant monitoring of telephone conversations. *People* v *Beavers*, 393 Mich 554; 227 NW2d 511, cert den 423 US 878 (1975). Warrantless participant monitoring is permitted under the federal Constitution. *US* v *White*, 401 US 745 (1971).

The subjective test of entrapment is followed under the U.S. Constitution. *US* v *Russell*, 411 US 423 (1973). Michigan follows the objective test. *People* v *Turner*, 390 Mich 7, 19; 210 NW2d 336 (1973).

The Michigan Constitution's double jeopardy provision bars prosecutions by "dual sovereignties" for the same crime. *People* v *Cooper*, 398 Mich 450; 247 NW2d 866 (1976). Compare *Bartkus* v *Illinois*, 359 US 121 (1959).

Even the Attorney General has acknowledged that Michigan law affords greater protection to the accused than the U.S. Constitution. He has recently been quoted as saying that Michigan's legal system:

"is more restrictive than the federal system in virtually every important area of criminal law and criminal procedure." See Appendix 2a.

The Michigan Supreme Court decision is based on an adequate state ground. The state Constitution was men-

tioned expressly as one basis of the opinion. If the Attorney General thought the decision was incorrect, he should have moved for rehearing pursuant to GCR 1963, 864.4. The Petition for Certiorari should be denied.

II. THE MICHIGAN SUPREME COURT DECISION APPLIED WELL-ESTABLISHED LEGAL PRINCIPLES TO PARTICULAR FACTS.

The Michigan Supreme Court did not repudiate *Terry* v *Ohio*, 392 US 1 (1968). Its decision involved the application of generally agreed upon legal principles to the unique facts of this case. Its decision is consistent with *Terry* and other authority. Unless this Court perceives its function to be the parsing for the possibility of error every appellate opinion applying its precedents, there is no occasion for further review.

Terry v *Ohio*, 392 US 1, 25-6, 30-1 (1968), authorized "pat-down searches" for weapons in the absence of probable cause, saying that such a search must "be strictly circumscribed by the exigencies which justify its initiation." In very limited circumstances, a police officer is "entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing" of a detainee to discover weapons which might be used to assault the officer.

> "Nothing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or indeed, any search whatever for anything but weapons." *Ybarra* v *Illinois*, 444 US 85, 93 (1979).

> "Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope." *Dunaway* v *New York*, 442 US 200, 210 (1979).

> "In the case of a self-protective search for weapons, [an officer] must be able to point to particular facts from

which he reasonably inferred that the individual was armed and dangerous." *Sibron* v *New York*, 392 US 40, 64 (1968).

In this case, the deputies were not able to point to particular facts from which they inferred that Long was either armed or dangerous. They never testified that they believed he was armed or dangerous. He was cooperative at all times (PT 19; Tr 181-2). He was never suspected of anything more serious than a traffic offense (PT 24). The folding knife which prompted the initial patdown was not illegal. See *People* v *Iverson*, 34 MichApp 519, 524; 191 NW2d 745, 747-8 (1971). Although one deputy was "concerned" about Long, his concern was not particularized and he admitted that Long had given the deputies no reason to draw their weapons or to take him to the patrol car (PT 27-8). The patdown search of Long showed that he was not armed (PT 23, 48-9; Tr 147, 159, 167). The deputies had less reason to believe that he was a danger to them after the patdown search than when the knife was first seen.

The Defendant, at the time of the search of the car, was outside it being detained by one of the deputies (PT 27; Tr 167), who would not have permitted him to get into the car while he was watching (PT 26; Tr 183).

Although the deputies claimed that their search was for weapons, they ignored screwdrivers, hammers and other legal, but potentially dangerous, objects (PT 22; Tr 182-3).

The deputies conducted a "generalized cursory search for weapons," extending beyond the "outer clothing" of the Defendant in the absence of particular facts inferring any exigency or danger. The Michigan Supreme Court's holding that this was unlawful was simply adherence to this Court's repeated admonitions to "jealously and carefully" draw exceptions to the warrant requirement and to limit warrantless searches to "the exigencies of the situation that made that course imperative." *Coolidge* v *New Hampshire*,

403 US 443, 455 (1971); *Terry* v *Ohio*, 392 US 1, 25-6 (1968). Further review by this Court is unwarranted.

None of the cases cited by the Attorney General in the Petition for Certiorari require a different result. As noted by the Michigan Supreme Court at 413 Mich 472 n.6, 320 NW2d 869 n.6, *Robbins* v *California*, 453 US 420 (1981) "is inapposite as the court in that case addressed the propriety of an automobile search conducted pursuant to probable cause." Since the officers never claimed that they were searching for contraband or that they had probable cause to arrest the Defendant, the only possible justification for looking inside the car was the "protective search" exception to the warrant requirement of the state and federal Constitutions.[1]

The holding of the case is consistent with *Canal Zone* v *Bender*, 573 F2d 1329 (5th Cir. 1978). The investigating officers in that case never indicated any reason to believe that the Defendants were armed or dangerous. They searched the interior of the car without first "patting down" the Defendants. In *US* v *Rainone*, 586 F2d 1132, 1136 (7th Cir. 1978), cert den 440 US 980 (1979), the Court characterized these actions as completely defeating "the protective rationale of *Terry*." Cf. Sibron v. New York, 392 US 40, 65 (1968), *People* v *Rosales*, 406 Mich 624; 281 NW2d 126 (1979), cert den 444 US 1025 (1980).

In this case, the deputies claimed to be searching for weapons, but they ignored tools like hammers and screwdrivers that could easily have been used as weapons,

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[1] Page 3 of the Petition for Certiorari hints that the deputies believed the Defendant had an open container of intoxicants illegally in the car. The deputies never said they searched Long's car because they thought it contained open intoxicants. A considerable extrapolation of the record is required to justify the conclusion that the deputies though Long's car contained open intoxicants (see App. 1a) Even if the deputies had probable cause to believe that Long was committing this misdemeanor, their search of the car without a warrant would have been unlawful under Michigan law. See *People* v *Lolley*, 113 MichApp 557, 317 NW2d 342, lv den 413 Mich 919 (1982).

thereby defeating the protective rationale of *Terry*. They said they were going to let the Defendant in the car to get his registration, but one of them testified that at least some of the papers they were looking for may have been found before the search. Defendant Long, like the Defendants in *Bender*, was outside the car during the search, under the control of the investigating officers, offering no threat to them, and not in a position to retrieve anything from the car. Simply put, as in *Bender*, *Sibron*, and *Rosales*, there is adequate reason to question the existence of the protective motive for the search required by *Terry*.

US v *Powless*, 546 F2d 792 (8th Cir.), cert den 430 US 910 (1977) held that investigating officers who had been given a reliable tip that the occupants of a particularly-described van were armed and dangerous had probable cause to search the van. A gun was discovered "in plain view" when one of the officers looked for the vehicle registration number of the van. The Court's discussion of extending a "frisk" of the Defendants to the van is dictum.

In *US* v *Rainone*, 586 F2d 1132 (7th Cir. 1978), cert den 440 US 980 (1979), the Defendants were reasonably believed to present "some danger" related to an ongoing, violent intra-family dispute. The Court specifically found that it was reasonable to believe that the Defendants were armed. There was not a lone defendant suspected of a traffic offense, as in this case. The Court held that "in the circumstances presented by this case . . ." it was proper for the investigating officers to conduct a limited search of the car's interior. The Court noted that the officer removed from the car only those items that appeared to be weapons. Deputy Howell concentrated his attentions on a very unweaponlike object. Since the facts of this case are not the same as those in *Rainone*, there is no conflict between them.

III. THERE IS NO DISPUTED APPLICATION OF FEDERAL PRECEDENT CONCERNING THE SEARCH OF THE TRUNK.

A. The Michigan Supreme Court Did Not Reach The Question Of Whether The Trunk Search Was A Proper Inventory Search Under *South Dakota* v *Opperman*.

The second issue framed by Petitioner includes the question of whether the seizure of marijuana from the trunk of Defendant's car violated *South Dakota* v *Opperman*, 428 US 364 (1976). The Michigan Supreme Court never reached this question. *South Dakota* v *Opperman* is not discussed in the majority opinion. Rather, the Court held that since there would have been no further search of the car had the search of the interior not uncovered contraband, the "fruit of the poisonous tree" doctrine of *Wong Sun* v *US*, 371 US 471 (1963) applied. The State has not argued that the Court incorrectly applied *Wong Sun*.

The decision to impound the car was not made until after the Defendant was arrested for possession of the marijuana found on the front seat (TR 139). As concurruing Justice Moody pointed out, the prosecution never sought to justify the trunk search under the "automobile exception," as a search incident to an arrest or as a search based on probable cause. 413 Mich 461, 481 n.2; 320 NW2d 866, 873 n.2. Since the impoundment and subsequent trunk search were a direct result of an unlawful search, *Wong Sun* was correctly applied.

What the Michigan Supreme Court would have done if *Wong Sun* had not applied is hypothetical. It would waste this Court's resources to review a concurring opinion in a Michigan Supreme Court case on a point not reached by the majority.

B. The Propriety Of The Trunk Search Involves Controlling Issues Of State Law.

If the Michigan Supreme Court had reached the merits of the trunk search, its decision would have been governed by controlling state precedent. Arrest for a traffic offense would not, under Michigan law, have justified searching the Defendant or impounding his car, particularly without first having given him the opportunity to post bond. *People* v *Dixon*, 392 Mich 691; 222 NW2d 749 (1974); *People* v *7th District Judge*, 55 MichApp 471, 476; 222 NW2d 778, 781 (1974); *People* v *Garcia*, 81 MichApp 260; 265 NW2d 115 (1978) and *People* v *Cavitt*, 86 MichApp 59; 272 NW2d 196 (1978).

The fact that the Defendant had not produced registration did not give the officers right to suspect that the vehicle was stolen or to search or impound it. *People* v *7th District Judge*, supra; *People* v *Marshall*, 23 MichApp 376, 379; 181 NW2d 578 (1970).

Even if the deputies had probable cause to believe that Long had committed a misdemeanor (possession of marijuana), they would not, under Michigan law, have been able to search his car without first securing a warrant, since the misdemeanor was not committed in their presence. *People* v *Lolley*, 113 MichApp 567; 317 NW2d 342, lv den 413 Mich 919 (1982).

Michigan has not adopted the rule of *US* v *Ross*, _____ US _____; 102 S Ct 2157; 72 LEd2d 572 (1982). Under Michigan precedent, discovery of marijuana in the interior of the car would not have justified a search of the trunk. *People* v *Hilber*, 403 Mich 312, 329; 269 NW2d 159 (1978). There was no lawful basis for impounding the car under Michigan law. The Writ of Certiorari should be denied.

C. The Deputies' Search Of Long's Car Trunk Was Not A Valid Inventory Search.

Deputy Howell testified that his Department did not do inventory searches. He said he had a personal policy of checking for valuables (PT 10-11). The police had absolutely secure storage facilities for the vehicle available, i.e. the basement of the police garage (Tr 176-7). These facts alone take this case outside the rationale of *South Dakota* v *Opperman*, 428 US 364, 376 (1976), which upheld inventory searches "following standard police procedures." *US* v *Chadwick*, 433 US 1, 13 (1977) analyzed the rationale for inventory searches saying:

> "Absolute secure storage facilities may not be available, and the size and inherent mobility of a vehicle makes it susceptible to theft or intrusion by vandals."

In short, the factors that led this Court to uphold the inventory search in *South Dakota* v *Opperman* are absent here. Even if the Michigan Supreme Court had reached this question, it would have been justified in finding the search unlawful.

CONCLUSION

The decision of the Michigan Supreme Court has an adequate basis in state law. It involves the application of well-established principles to unique facts. Some of the issues sought to be reviewed were not reached by the Michigan Supreme Court. Had they been reached, they would have been controlled by applicable state law. The State has never sought to justify the searches in this case on any grounds other than those adequately addressed in the lower courts. Recent decisions of this Court dealing with other exceptions to the warrant requirement are not applicable. The Petition for Certiorari ought to be denied.

Respectfully submitted,

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Preliminary Examination

TESTIMONY OF GEORGE HOWELL (CROSS)

Q. What would you say? How would you describe him as far as his conduct?

A. He appeared to be under the influence of something.

Q. Okay, anything besides that?

A. You're asking me for opinion, my opinion?

Q. Pardon?

A. In my opinion he acted scared.

Q. He what?

A. I said in my opinion he acted scared.

Q. He acted scared? Well, don't most people when they are stopped by a police officer at twelve o five act a little nervous and scared?

A. No sir.

Q. You don't think so?

A. No sir.

Q. I see, you've never had that experience I take it?

A. Yes I have at times. Usually they have open intox in the car or something like that.

KALAMAZOO GAZETTE

Thursday, July 29, 1982 PAGE D-5

Michigan 'more restrictive' in criminal law

MACKINAC ISLAND (UPI) — Attorney General Frank Kelley today urged Michigan prosecutors to support federal and state moves to correct the "out of kilter" balance between the rights of the society and accused criminals.

"All of us involved in law enforcement are concerned about and committed to protection of the civil liberties of the accused," Kelley said.

Kelley said Michigan's legal system "is more restrictive than the federal system in virtually every important area of criminal law and criminal procedure.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

STATE OF MICHIGAN

PETITIONER,

V.

DAVID KERK LONG,

RESPONDENT,

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MICHIGAN

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I.

WHETHER POLICE OFFICERS AT A TRAFFIC STOP ACTED UNREASONABLY UNDER TERRY v OHIO AND US CONST, AM IV IN LIFTING THE FRONT SEAT CENTER ARMREST OF DEFENDANT'S CAR TO INVESTIGATE THE "LEATHER" ARTICLE PROTRUDING THEREUNDER (VISIBLE FROM OUTSIDE THE CAR), AFTER THEY SEIZED A FOLDING HUNTING KNIFE FROM THE CAR FLOORBOARD (VISIBLE FROM OUTSIDE THE CAR) WHEN THE POLICE WERE CONTINUING THEIR INVESTIGATION TO DETERMINE IF THE DISORIENTED DEFENDANT WOULD BE PERMITTED TO RE-ENTER THE VEHICLE TO OBTAIN THE VEHICLE REGISTRATION OR WHETHER THE DEFENDANT WOULD BE ARRESTED?

II

WHETHER THE SEIZURE OF 75 POUNDS OF MARIJUANA FROM THE TRUNK OF DEFENDANT'S IMPOUNDED CAR FOLLOWING HIS ARREST VIOLATED SOUTH DAKOTA v OPPERMAN OR WAS THE "FRUIT" OF THE ILLEGAL ARMREST "SEARCH" PER WONG SUN v UNITED STATES?

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The opinion of the Michigan Supreme Court is reported at 413 Mich 461; 320 NW2d 866 (1982). The Michigan Court of Appeals' opinion is reported at *People* v *Long*, 94 Mich App 338; 288 NW2d 629 (1979).

JURISDICTION

The opinion of the Michigan Supreme Court was issued June 14, 1982, and the jurisdiction of this court is invoked under 28 USC 1257(3). The petition for a writ of certiorari was filed within the time prescribed in Supreme Court Rule 20.1, and the writ was granted in an order entered October 12, 1982.

CONSTITUTIONAL PROVISIONS INVOLVED

US Const, Am IV:

> "The right of the People to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Mich Const 1963, art 1, § 11:

> "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceedings any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state."

No. 82-256

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

STATE OF MICHIGAN,
PETITIONER,

V.

DAVID KERK LONG,
RESPONDENT,

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MICHIGAN

BRIEF OF PETITIONER

STATEMENT OF CASE

Just after 12 midnight of August 24-25, 1977, Deputy Howell and Deputy Lewis of the Barry County Sheriff Department clocked a car speeding past them in the opposite direction. By radar the car was hitting 71 miles an hour. (J.A. 11a, 56a, 76a, 119a). The deputies pursued the car without flashers, then lost it, then saw it make a left turn, and proceed down the side road, then swerve, then stop. (J.A. 11a, 23a, 47a, 77a, 108a). When the deputies arrived on the scene, the Mercury sedan was jammed into a ditch and sat broadside on the highway. (J.A. 11a, 14a, 56a, 78a, 116a). David Long, the driver and sole occupant, still sat behind the wheel. (J.A. 11a, 47a, 78a, 108a).

As the deputies approached the car, the driver got out of the Mercury, left his door wide open, and met the deputies

at the rear of the Mercury. (J.A. 11a, 12a, 24a). Deputy Howell asked for a driver's license. The driver just stared and made no response. (J.A. 11a, 24a, 48a, 79a). Howell asked again. The driver waited a few seconds then produced a license. Howell asked for a registration and proof of insurance. No movement, no response. Then, without a word, the driver turned and walked back to his opened door. (J.A. 11a, 26a, 48a, 56a, 79a, 91a, 110a). Howell formed an opinion that defendant "appeared to be under the influence of something" (J.A. 25a). Howell felt that the driver "acted scared," not so much from the traffic stop but similar to when "they have open intox in the car or something like that." (J.A. 25a, 119a). Deputy Howell refused to describe defendant as "passive." (J.A. 25a). The deputies followed the defendant.

As they all approached the opened door, both deputies saw a large folded knife lying on the driver's floorboard in front of the seat near the open door. (J.A. 12a, 26a, 27a, 49a, 57a, 79a). The defendant was told to "hold it" and put his hands on the roof. Howell frisked the defendant for weapons, while Lewis retrieved the weapon (Exhibit 1) (J.A. 12a, 29a, 49a-50a, 80a). The weapon was a large folding Browning knife. (J.A. 12a). [Photographs of Exhibit 1 were filed with the Supreme Court in a motion to expand the record. See GCR 1963, 812.4, 862. The knife has a 4" blade and when fully extended, the weapon is approximately 9" in length.]

The deputy said after seizing the knife that the driver was not under arrest but was "not free to leave" because the deputy "still wanted to talk to him." (J.A. 30a).

Deputy Howell then shined his flashlight into the front seat area of the car to search for further weapons (J.A. 13a, 33a, 35a, 52a, 81a, 100a). Deputy Howell testified that he was not going to let defendant go to the car door after seeing and seizing the

knife from defendant's car (J.A. 32a, 54a). In the light of his flashlight, Howell saw something leather-like sticking out under the folded down dual front seat armrest. (J.A. 13a, 57a, 82a, 94a, 100a). Aside from some papers on the floor area, nothing else appeared in the front seat area. (J.A. 26a). Howell kneeled in the vehicle, raised the driver-side armrest and, with his flashlight saw an open leather pouch. (J.A. 13a, 57a, 83a). The pouch was large enough to hold a weapon in it. (J.A. 36a). Before touching it Howell saw a clear plastic baggie protruding from one side of the open pouch containing a grass-like material. (J.A. 13a, 36a, 37a, 101a). The material appeared to Howell to be marijuana. (J.A. 13a, 83a). Howell removed the pouch and baggie, showed it to Lewis and both confirmed it as being marijuana. (J.A. 84a). Feeling a solid object in the pouch (J.A. 13a), the deputy determined that the pouch also contained a bottle filled with white powder, a tin foil wrapped pill and a package of roll-your-own cigarette papers. (J.A. 13a, 14a, 37a, 38a).

Defendant was arrested for Possession of Marijuana (J.A. 14a, 39a, 84a) and the decision to impound the car was made (J.A. 14a, 57a, 85a). Then, the car interior was searched again for additional contraband, and the glove box for any vehicle registration. (J.A. 14a). No contraband or registration were found. A title for the 1972 Mercury was found in the glove box. (J.A. 14). Outside the car, Deputy Howell asked defendant for the key, having noticed that the key was missing from the ignition. (J.A. 14a). Defendant handed over a single key. When asked for the trunk key, defendant stated "I have no key." (J.A. 15a, 57a, 86a, 100a).

After deciding to impound the car, and pursuant to his "standard policy" to check for valuables, (J.A. 15a, 16a), and further contraband, (J.A. 17a, 86a), Deputy Howell walked around the car and observed that the trunk lock "had been punched out," leaving a hole. (J.A. 16a). Two handprints

were evident on the trunk lid "in the dust." (J.A. 86a). Inserting his own pocketknife into the hole, Deputy Howell tripped the latch and raised the lid. (J.A. 16a, 86a). In the trunk, two large bags with a split in both, were seen to contain marijuana. (J.A. 19a, 40a, 115a). Defendant was then handcuffed, placed in the cruiser, and transported along with the towed car to the sheriff's department. (J.A. 20a). The trunk bags weighed about 75 pounds total. (J.A. 89a).

Following his arraignment, a preliminary examination was held on September 22, 1977. (J.A. 1a). Defendant was bound over on, among other things, Possession with Intent to Deliver. (J.A. 60a). An Information charging Possession with Intent to Deliver Marijuana was filed (J.A. 60a) and a Motion to Suppress was made (and denied, on April 28, 1978, J.A. 62a-65a). Another Motion to Suppress was made on August 28, 1978, (J.A. 70a), and denied (J.A. 73a). Various motions were made in limine (J.A. 65a-70a). Two pretrial hearings were held. (J.A. 62a-65a). A pretrial Motion to Suppress was heard and denied (J.A. 70a-74a). Jury trial commenced on August 28, 1978, and the charge of Possession of Marijuana with Intent to Deliver was reduced to Possession of Marijuana following an improper opening statement by the prosecutor. (J.A. 74a). A motion was made to exclude the seized contraband at trial after the prosecutor rested, and was denied (J.A. 122a-124a). A motion for a directed verdict was made and denied. (J.A. 125a-127a).

Defendant was convicted of Possession on August 29, 1978, following an hour's deliberation by the Jury. Defendant was placed on a two year probation and fined approximately $1,000. (J.A. 129a).

Defendant appealed. The Court of Appeals affirmed defendant's conviction at 94 Mich App 338; 288 NW2d 629 (1979). Leave was granted by the Supreme Court on July 15,

1980, and the parties were "directed to include among the issues to be briefed whether the marijuana found in the automobile driven by defendant should have been suppressed as the product of an illegal search."

The Michigan Supreme Court reversed the conviction at *People* v *Long*, 413 Mich 461; 320 NW2d 866 (1982).

The Attorney General for the State of Michigan filed a petition for writ of certiorari which was docketed in this Court on August 13, 1982. On October 12, 1982, the petition for writ of certiorari was granted.

SUMMARY OF ARGUMENT

Defendant, David Long, speeding and being pursued by Sheriff's deputies on a lonely county road late at night, jammed his car into a roadside ditch. David Long, who was the driver and sole occupant met the approaching deputies outside his car. During the investigation by the deputies, the disoriented defendant-driver failed to produce proper vehicle identification, and led the deputies back to defendant's open car door. At the open door of defendant's car, one deputy stopped defendant when he saw and seized a knife from the car floorboard; the other deputy frisked the defendant. The deputies were very concerned about more weapons in the car. Before letting defendant re-enter the car to get the needed identification, one deputy flashed his flashlight over the defendant's front seat and saw a leather object under the folded down center armrest. The deputy kneeled in the seat and flipped up the armrest and in the light of his flashlight saw an open pouch big enough to hold another weapon. Protruding from the pouch was a plastic bag containing grass-like material. In the light of his flashlight and without touching the bag, the deputy believed the grass-like material was marijuana. The pouch was

seized, and defendant was arrested for possessing marijuana; defendant's car was impounded. While waiting for the tow truck, one deputy raised the lock-less trunk lid and saw and seized the two large open plastic garbage bags containing approximately 75 lbs of marijuana.

The "armrest" frisk in this case (*People* v *David Long*, 413 Mich 461; 320 NW2d 866 (1982)) did not violate *Terry* v *Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968) or the Fourth Amendment during this valid investigation where the deputies were reasonably concerned about more weapons being in the car.

Terry, noting the large number of police deaths in the United States in the line of duty, found it unreasonable to prevent police officers from taking those measures necessary to neutralize the threat of physical harm when investigating suspicious persons or circumstances where weapons are reasonably suspected (or in fact exist, as in this case).

The *Terry* rationale applies where probable cause may not yet exist, but a reasonable suspicion persists that the present situation is dangerous.

The scope of the *Terry* "frisk," left for future case development, was limited to the justification for the need for the frisk. In this case, the armrest frisk met the scope of the Terry rationale; *i.e.*, "an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officers." *Terry* v *Ohio*, 392 US at 29.

Although *Terry* did not arise in a case involving an automobile, *Terry* was applied in an automobile context in *Adams* v *Williams*, 407 US 143; 92 S Ct 1921; 32 L Ed 2d 612 (1972). There, this Court upheld the *Terry* "frisk" of a driver seated

behind the wheel of a stationary vehicle. The frisk in *Adams* reasonably escalated into a justifiable search of defendant's car as part of the automobile exception cases, *Carroll* v *United States*, 267 US 132; 45 S Ct 280; 69 L Ed 543 (1925) and *Brinegar* v *United States*, 338 US 160; 69 S Ct 1302; 93 L Ed 1879 (1949).

Pennsylvania v *Mimms*, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977) correctly applied the *Terry* rationale to a situation involving a traffic stop where the driver was ordered out of the car—for the officer's safety. *Pennsylvania* v *Mimms* could not and did not ignore the police death statistics in traffic stop situations, and held that a *Terry*-type protective frisk was a *de minimis* intrusion of a Fourth Amendment right when balanced against a police officer's perceived need to protect himself.

The initial stop and investigation by the deputies in this case was never contested. The armrest frisk was less intrusive to defendant then a frisk of his person.

Numerous federal and state cases have upheld the limited frisk of automobiles for weapons in *Terry*-type investigations involving automobiles. Given the limited expectation of privacy in automobiles, and the ongoing investigation in this case, the armrest frisk here was no more extensive than was necessary to disclose any weapon reasonably suspected of being hidden under it.

The Fourth Amendment does not require that investigating officers defer protective measures to the point of peril, when reasonable grounds exist for believing, that their safety requires a frisk.

In *Canal Zone* v *Bender*, 573 F2d 1329 (CA 5, 1978), the appeals court believed that the need for a *Terry* protective

frisk of an automobile is dissipated when the suspects are outside the car surrounded by police. However, *Canal Zone* ignores the danger to investigating officers where no arrest is made but the investigation is ongoing and one weapon was already seen and seized, and the defendant may be allowed to re-enter his vehicle to obtain further identification. In this short span of time, under these circumstances, the deputy here reasonably frisked the front armrest of defendant's car. Other state and federal cases, dealing with automobile frisks where the suspect(s) were outside the car, would uphold the armrest search.

The Michigan Supreme Court's decision below by adopting the reasoning of *Canal Zone* v *Bender*, applied the *Terry* rationale too narrowly and should be reversed.

The search and seizure of the 75 lbs. of marijuana from defendant's trunk following the valid impoundment of the car was a proper inventory search under *South Dakota* v *Opperman*, 428 US 364; 96 S Ct 3092, 49 L Ed 2d 1000 (1976).

Although the Michigan Supreme Court did not address the validity of the inventory search of the trunk, one partially dissenting justice did, and found the trunk search invalid as factually distinguishable from *South Dakota* v *Opperman; i.e.*, no standard procedure exists in the Barry County Sheriff's Department for conducting inventory searches, and the parking lot for impounded cars in Barry County was secure.

South Dakota v *Opperman* considered the *standard procedures* rationale in *Cady* v *Dombrowski*, 413 US 433; 37 L Ed 2d 706; 93 S Ct 2523 (1973) as only "a factor tending to ensure" that an inventory was as limited as necessary to fulfill the caretaking function of the police. Petitioner believes, however, that the raising of the lockless trunk lid must have

comported with any "standard procedure for inventory searches" adopted by police agencies and approved by courts around the country. The lower courts in Michigan uniformly approved of the inventory search in this case.

In addition, on the facts in this record, this Court may find probable cause to search the trunk under the teaching of *United States* v *Ross*, ... US ....; 102 S Ct 2157; 72 L Ed 2d 572 (31 Cr L 3051, June 1, 1982) and *Michigan* v *Thomas*, ... US ....; 102 S Ct 3079; 73 L Ed 2d 750 (31 Cr L 4103, June 30, 1982).

Finally, *Wong Sun* v *United States*, 371 US 471; 88 S Ct 407; 9 L Ed 2d 441 (1963), relied on by the Michigan Supreme Court to suppress the marijuana seized from the car trunk was misapplied, if the seizure of marijuana from inside the car as a result of the "armrest frisk" was reasonable, and defendant's arrest for possession of marijuana was appropriate.

ARGUMENT

I.

POLICE OFFICERS AT A TRAFFIC STOP DID NOT ACT UNREASONABLY UNDER TERRY V OHIO AND US CONST, AM IV IN LIFTING THE FRONT SEAT CENTER ARMREST OF DEFENDANT'S CAR TO INVESTIGATE THE "LEATHER" ARTICLE PROTRUDING THEREUNDER (VISIBLE FROM OUTSIDE THE CAR), AFTER THEY SEIZED A FOLDING HUNTING KNIFE FROM THE CAR FLOORBOARD (VISIBLE FROM OUTSIDE THE CAR) AND THE POLICE WERE CONTINUING THEIR INVESTIGATION TO DETERMINE IF THE DISORIENTED DEFENDANT WOULD BE PER-

MITTED TO RE-ENTER THE VEHICLE TO OBTAIN THE VEHICLE REGISTRATION OR WHETHER THE DEFENDANT WOULD BE ARRESTED.

Defendant was speeding and jammed his car into a roadside ditch. The pursuing sheriff deputies stopped their cruiser and met defendant at the back of his immobilized car. Defendant failed to produce the proper identification and, without uttering a word, walked back to his opened car door. Defendant appeared to be "on something" in the opinion of the deputies. The two deputies followed the defendant to his car and saw a knife on the floor of defendant's car. This weapon, visible from outside the automobile, was seized from the car. Defendant was then frisked, producing nothing. One deputy standing by the open door shined a flashlight on the front seat of defendant's car to look for more weapons, before letting defendant re-enter the auto to get further identification. Seeing something protruding from under the folded down center armrest, one deputy knelt on the front seat, flipped up the armrest and saw a baggie of marijuana under it. Defendant was arrested for possession of marijuana. In *People* v *Long*, 413 Mich 461; 320 NW2d 866 (1982), the Michigan Supreme Court erroneously held the armrest frisk to be invalid under *Terry* v *Ohio*, 392 US 1; 20 L Ed 2d 889; 88 S Ct 1868 (1968).

After seizing defendant's knife from the floorboard, the warrantless frisk of the front seat area of defendant's car following the pat down of his person, did not violate *Terry* v *Ohio* or the Fourth Amendment. In *Terry*, the United States Supreme Court, noting the large number of deaths of police officers in the United States in the line of duty, particularly with guns and knives, reasoned:

> "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the offi-

cer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."

Terry v *Ohio, supra,* 392 US at 24

See also *Adams* v *Williams, supra,* 407 US at 148, fn 3; *United States* v *White,* 648 F2d 29, 35, fn 29, 37, fn 38 and fn 39 (CA DC, 1981). In defining the *Terry* "stop and frisk" rationale, the United States Supreme Court said:

"Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Cf. *Beck* v *Ohio,* 379 US 89, 91, 13 L Ed 2d 142, 145, 85 S Ct 223 (1964); *Brinegar* v *United States,* 338 US 160, 174-176, 93 L Ed 1879, 1889-1891, 69 S Ct 1302 (1949); *Stacey* v *Emery,* 97 US 642, 645, 24 L Ed 1035, 1036 (1878). And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. Cf. *Brinegar* v *United States supra.*"

Terry v *Ohio, supra,* 392 US at 27 (footnote omitted)

This Court found that the evidence seized in *Terry* "was discovered by means of a seizure and search which were . . . reasonably related in scope to the justification for [its] initiation." 392 US at 29. In applying the "stop and frisk" rule to other cases, this Court said:

> "We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases. See *Sibron* v *New York*, 392 US 40, 20 L Ed 2d 917, 88 S Ct 1889. Suffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. See *Preston* v *United States*, 376 US 364, 367, 11 L Ed 2d 777, 780, 84 S Ct 881 (1964). The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.
>
> "The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. He never did invade Katz' person beyond the outer surface of his clothes, since he discovered nothing in his pat-down which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He

> did not conduct a general exploratory search for whatever evidence of criminal activity he might find."
>
> *Terry* v *Ohio*, *supra*, 392 US at 29-30

Terry v *Ohio* did not arise in an automobile context.

In *Adams* v *Williams*, *supra*, the Court applied *Terry* v *Ohio* to uphold the warrantless search and seizure of a weapon from defendant's waistband as defendant sat behind the wheel of his stationary automobile. Defendant was arrested for possessing the gun. A search of defendant's person revealed heroin in defendant's pocket, followed by a car search revealing more weapons in his car.[1] In *Adams*, the informant's tip telling the police about the gun, though perhaps insufficient to establish probable cause, for purposes of a search warrant or arrest, was sufficient for a *Terry* "stop and frisk." The Court, agreeing that the investigating officer had ample reason to fear for his safety based on this tip, said:

> "So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose." (footnote omitted)
>
> *Adams* v *Williams*, *supra*, 407 US at 146

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[1]

In *Adams* v *Williams*, the subsequent warrantless search of defendant's car as incident to defendant's arrest for possession of the gun and heroin was reasonable, based on probable cause for such a car search under the *Carroll* v *United States*, 267 US 132; 69 L Ed 543; 45 S Ct 280 (1925) and *Brinegar* v *United States*, 338 US 160; 93 L Ed 1879; 69 S Ct 1302 (1949) automobile exception.

The court below in *Williams* v *Adams*, 441 F2d 394 (CA 2, 1971) found no probable cause for the waistband, pocket, or the car search and had ordered the evidence suppressed.

In the instant case, the officers saw and seized one weapon from the car during a valid stop. Before letting defendant re-enter the same car to get his vehicle identification, the frisk of the front seat area including the raising of the armrest to determine the nature of the leather object seen under the armrest from outside the car was reasonable under the *Terry* rationale (*i.e.*, protection of the officers and others nearby) and consistent with *Terry* as applied in *Adams* v *Williams*. *Accord, United States* v *Thomas*, 314 A 2d 464 (DC App, 1974).

Here, the deputies seeing and seizing one weapon were clearly worried about other weapons in the car. One deputy agreed that he was not going to let defendant go to the car after seeing and seizing the knife from the car.

In *Pennsylvania* v *Mimms*, 434 US 106; 54 L Ed 2d 331; 98 S Ct 330 (1977), the application of *Terry* v *Ohio* in a traffic stop situation to justify a police command to the occupants to leave the vehicle was accepted as "too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty." There the Court recognized:

> ". . . the inordinate risk confronting an officer as he approaches a person seated in an automobile. • • • We are aware that not all these assaults occur when issuing traffic summons, but we have before expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations. *United States* v *Robinson*, 414 US 213, 234, 38 L Ed 427, 94 S Ct 467, 66 Ohio Ops 2d 202 (1973). Indeed, it appears 'that a significant percentage of murders of police officers occurs when the officers are making traffic stops.' Id., at 234 n 5, 38 L Ed 2d 427, 94 S Ct 467, 66 Ohio Ops 2d 202."
>
> *Pennsylvania* v *Mimms, supra*, 434 US at 110.

After Mimms was ordered out of his car, the "bulge" under Mimms' coat was frisked and the weapon thereunder was seized and this Court held that the action taken was appropriate under the *Terry* standard. "In these circumstances, any man of 'reasonable caution' would likely have conducted the 'pat down.'" 434 US at 112.

The traffic stop in the instant case was never contested below. The propriety of the police investigating the immobilized car was never questioned either.

Given the valid stop and investigation by the police of a strangely behaving driver who stuck his car in a ditch and who could not produce proper vehicle documents, the sight of the knife in defendant's car only heightened the danger of the situation in the minds of these deputies. After seeing and seizing the knife, one deputy then immediately *patted defendant down*. But, before letting defendant re-enter the car to obtain further identification, the deputy shined his flashlight onto the front seat and saw a "leather-like" article under the armrest. The deputy "frisked" the front seat area of defendant's car by flipping up the armrest. Under these circumstances, and given the limited expectation of privacy in automobiles,[2] this *de minimis* intrusion under the armrest of a stopped vehicle under investigation, like frisking the bulge in a coat, is an insignificant invasion of a defendant's personal security when balanced against the legitimate concerns of the People for the officer's safety. *Pennsylvania* v *Mimms*, *supra*, 434 US at 109, 111. Indeed, the frisk of a bulge in clothing is *more* personally intrusive than flipping up an armrest to investigate for additional weapons where one weapon was clearly seen on the floorboard.

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[2]

Cf., *South Dakota* v *Opperman*, 428 US 364, 367-368; 49 L Ed 2d 1000, 1004; 96 S Ct 3092 (1976).

In this case, as in *Brown* v *State*, 358 So 2d 596, 601 (Fla App, 1978):

> "The search was limited to a manner no more extensive then was necessary to disclose any weapon hidden under the armrest. Consequently, the search under the armrest fell within the scope of a protective search. The police officer acted reasonably in his search under the armrest. Accord, *Commonwealth* v *Almeida*, 366 NE 2d 756 (Mass, 1977)."
>
> *Brown* v *State*, 358 So 2d 596, 601

Accord, State v *Darling*, 393 A 2d 530 (Maine, 1978); *Commonwealth* v *Silva*, 366 Mass 402; 318 NE 2d 895 (1974); *Commonwealth* v *Almeida*, 373 Mass 266; 366 NE2d 756, 760 (1977); *State* v *Brown*, 160 NJ Super 227; 389 A 2d 507 (1978); *State* v *Malbeck*, 15 Wash App 871; 552 P2d 1092 (1976); *United States* v *Thomas, supra, United States* v *Wilkerson*, 598 F2d 621 (CACD, 1978); *United States* v *Rainone*, 586 F2d 1132 (CA 7, 1978), *cert den* 440 US 980; 60 L Ed 2d 239; 99 S Ct 1781 (1979).

In this case, as in other cases where the circumstances in a traffic stop escalate to support a reasonable suspicion by the investigating police that a situation is potentially dangerous to them or to others, the rationale of *Terry*—the protection of the investigating officer and others nearby—permits the officer to make a frisk of the automobile, limited to what is minimally necessary to uncover weapons to which the suspect will have easy access.

> "An officer 'need not defer protection measures to the point of peril. All the law requires is that he have reasonable basis for believing that his safety or the safety of others requires a search or seizure.'"
>
> *United States* v *Green*, 465 F2d 620, 623-624 (CADC, 1972).

Accord, *United States* v *Wilkerson, supra; Commonwealth* v *Almeida, supra; United States* v *Rainone, supra; State* v *Gilchrist*, 299 NW2d 913 (Minn, 1981); *State* v *Luxem*, 324 NW2d 273 (32 CrL 2041, September 8, 1982) [citing and distinguishing *People* v *Long*, 413 Mich 461; 320 NW2d 866; (1982)].

The deputy flipped up the armrest to look for more weapons. He saw the pouch and the plastic baggie sticking out of it containing marijuana. The seizure of the marijuana in the process of checking for more weapons was a happenstance, not a violation of the Fourth Amendment. See *Williams* v *State*, 19 Md App 204, 213; 310 A2d 593 (1973). The scope of the intrusion here was "reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry, supra*, 392 US at 29.

In *Terry* stops involving automobiles, it has been held that once a defendant leaves the automobile, the defendant has no access to weapons in the car, thereby posing no danger to the investigating police. *Canal Zone* v *Bender*, 573 F2d 1329 (CA 5, 1978).

Canal Zone, supra, does not address the very real danger to the police when suspects who are outside the car are permitted to re-enter the car, while the police are still investigating the encounter with the suspect, or where the suspects are not detained or arrested but are released to re-enter their car and drive away. In such instances where danger to the investigating police exists (one weapon seen in defendant's car, another possible weapon exists under the armrest) and where defendant has not yet been arrested (and may not be), the courts, dealing with this issue, have upheld a reasonable protective frisk of the car interior. *United States* v *Powless*, 546 F2d 792 (CA 8, 1977), *cert den*, 430 US 910; 97 S Ct 1185; 51 L Ed 2d 588 (1977); *United States* v *Wilkerson, supra;*

United States v *Rainone*, (cert den) *supra; State* v *Gilchrist, supra; Commonwealth* v *Almeida, supra; Uptegraft* v *State*, 621 P2d 5 (Alaska, 1980); *United States* v *Green, supra; United States* v *Thomas, supra; State* v *Brown, supra; State* v *Darling, supra; Brown* v *State, supra.*

Petitioner urges the court to permit a protective frisk of that part of defendant's car reasonably accessible to defendant when he seeks to re-enter the vehicle to obtain needed identification in circumstances such as this case where the investigation by the police is still ongoing, and the police reasonably fear for their safety.

The Michigan Supreme Court construued *Terry* v *Ohio* too narrowly, by not giving full effect to the *Terry* rationale—the protection of police officers validly investigating a suspicious driver of an automobile immobilized after a high speed pursuit, under circumstances indicating some peril to the officers or defendant.

II.

THE SEIZURE OF 75 POUNDS OF MARIJUANA FROM THE TRUNK OF DEFENDANT'S IMPOUNDED CAR FOLLOWING HIS ARREST DID NOT VIOLATE SOUTH DAKOTA V OPPERMAN AND WAS NOT THE "FRUIT" OF THE ILLEGAL ARMREST SEARCH PER WONG SUN V UNITED STATES.

The validity of the armrest search and the subsequent trunk search following defendant's arrest was raised by argument during defendant's preliminary examination on September 22, 1977, (J.A. 16a-18a). The district judge's written opinion of December 28, 1977, upheld the armrest search as a proper protective search and the trunk search as a valid inventory

search and as a search incident to defendant's valid arrest. Defendant filed a pretrial motion to suppress and to quash based on the invalidity of the searches; this motion was denied by the circuit judge at the April 28, 1979, pretrial hearing. The circuit judge, on independent review, found the armrest and trunk searches reasonable as valid protection and proper inventory. Defendant again raised the search issue during trial by a motion to reconsider the denial of suppression (J.A. 70a-72a) and the trial judge denied reconsideration as unwarranted, holding both searches reasonable and distinguishable from the state and federal cases cited by defendant (J.A. 73a-74a). Towards the close of the prosecution's case, defendant again sought exclusion of the tendered marijuana sample-exhibits as the fruit of the unreasonable auto searches (J.A. 122a-123a). After argument, the trial judge again ruled the auto searches were valid protection and proper inventory (J.A. 124a).

Defendant was convicted of possession of marijuana [MCL 333.7403(2)(d); MSA 14.15(7403)(b)(4)], and the Michigan Court of Appeals, 94 Mich App 338; 288 NW2d 629 (1979) affirmed the conviction, holding both the armrest search valid under *Terry* v *Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), and the inventory trunk search valid under *South Dakota* v *Opperman*, 428 US 364; 96 S Ct 3092; 49 L Ed 2d 1000 (1976) and the US Const, Am IV. The Michigan Supreme Court reversed citing US Const, Am IV and Mich Const 1963, art 1, § 11, and holding that *Terry, supra* did not authorize a protective search of an area, and that the trunk search was an illegal "fruit" of an invalid arrest per *Wong Sun* v *United States*, 371 US 471; 88 S Ct 407; 9 L Ed 2d 441 (1963). The dissenting chief justice would affirm the armrest search as proper protection, and the trunk search as proper inventory. Another justice, partially dissenting, would affirm the armrest search as proper protection, but would reverse the inventory trunk search as invalid.

Thus, the validity of the inventory search was never reached by the Michigan Supreme Court majority. One partially dissenting justice did find the inventory search invalid, as factually distinguishable from *South Dakota* v *Opperman*. This justice believed that the impounded car was searched without any inventory search procedures having been established by the Barry County Sheriff's Department, and because a warrantless inventory search was unnecessary, given the secure police parking lot situation in this case.

Petitioner believes that *South Dakota* v *Opperman* does "point the way to the correct resolution of this case." *South Dakota* v *Opperman, supra*, 428 US at 375. In *South Dakota* v *Opperman*, the police properly impounded the unoccupied vehicle for parking violations and saw personal effects in the car, from outside the car. Opperman's locked car was unlocked "at the officer's direction." The officer entered the car, opened the unlocked glove box and seized marijuana found therein. The United States Supreme Court majority, citing several cases including *Cady* v *Dombrowski*, 413 US 433; 93 S Ct 2523; 37 L Ed 2d 706 (1973); *Chambers* v *Maroney*, 399 US 42; 90 S Ct 1975; 26 L Ed 2d 419 (1970) reh den 400 US 856; *Cooper* v *California*, 386 US 58; 87 S Ct 788; 17 L Ed 2d 730 (1967); and *Harris* v *United States*, 390 US 234; 88 S Ct 992; 19 L Ed 2d 1067 (1968), reasoned:

> "The decisions of this Court point unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures are reasonable. In the first such case, Mr. Justice Black made plain the nature of the inquiry before us:
>
> " 'But the question here is not whether the search was *authorized* by state law. The question is a rather whether the search was reasonable under the Fourth Amendment.' *Cooper* v *California*, 386 US, at 61, 17 L Ed 2d 730, 87 S Ct 788 (emphasis added)

"And, in his last writing on the Fourth Amendment, Mr. Justice Black said:

"[T]he Fourth Amendment does not require that every search be made pursuant to a warrant. It prohibts only "*unreasonable* searches and seizures." The relevant test *is not the reasonableness of the opportunity to procure a warrant*, but the reasonableness of the seizure under all the circumstances. The test of reasonableness cannot be fixed by per se rules; each case must be decided on its own facts.' *Coolidge* v *New Hampshire*, 403 US, at 509-510, 29 L Ed 2d 564, 91 S Ct 2022 (concurring and dissenting) (emphasis added)."

South Dakota v *Opperman, supra*, 428 US at 372-373.

This Court in *Opperman* rejected the notion that inventory searches applied only to non-criminal settings, noting that in *Cooper* v *California*, the inventory search occurred "in a distinctly criminal setting" (428 US at 373), and that "probable cause to search for contraband in the vehicle had not been established" (428 US at 373).

The Court in *Opperman* also recalled its earlier holding in *Cady* v *Dombrowski* where the inventory search of the impounded car belonging to an off-duty police officer was made based on the "reasonable grounds to believe a weapon might be in the car." There, the inventory search "was incident to the caretaking function of the local police to protect the community's safety." 428 US at 374. The United States Supreme Court found that the *Cady* inventory search was protective and carried out in accordance with standard procedures in the local police department. Significantly, the United States Supreme Court in *Opperman* characterized the *standard procedures* rationale in *Cady* as:

". . . a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function."

South Dakota v *Opperman, supra,* 428 US at 375

Although a standard departmental procedure for inventory searches did exist in *Opperman,* the United States Supreme Court in *Opperman* put the "standard procedure" rationale of *Cady* into proper perspective by saying:

"As in Cady, there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive.fn [10]

On this record we conclude that in following standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts, the conduct of the police was not 'unreasonable' under the Fourth Amendment."

---

fn [10]

The inventory was not unreasonable in scope. Respondent's motion to suppress in state court challenged the inventory only as to items inside the car not in plain view. But once the policeman was lawfully inside the car to secure the personal property in plain view, it was not unreasonable to open the unlocked glove compartment, to which vandals would have had ready and unobstructed access once inside the car.

The "consent" theory advanced by the dissent rests on the assumption that the inventory is exclusively for the protection of the car owner. It is not. The protection of the municipality and public officers from claims of lost or stolen property and the protection of the public from vandals who might find a firearm, Cady v Dombrowski, or as here, contraband drugs, are also crucial.

Here, defendant was validly stopped. With one weapon already seen in his car, the front seat of defendant's car was protectively frisked for more weapons. He was arrested for possession of marijuana seized from his car in the course of searching for other weapons. His car was impounded, then inventoried. The inventory search consisted of lifting the trunk lid. The trunk lid had no lock. Surely, lifting an unlockable trunk lid of a validly impounded car comported with "standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts." (See 428 US at 376 quoted above).

Court approval of the "standard police procedure" used here (raising an unlockable trunk lid of a validly impounded car) did occur since the district court, the circuit court, and the Court of Appeals affirmed the inventory search of defendant's trunk as being valid and the Michigan Supreme Court majority never addressed the validity of the inventory search of defendant's trunk.

Given these circumstances (the driver and the sole occupant was speeding and jammed his car into a roadside ditch, the deputies had pursued the speeding car, the driver had a knife and lacked proper identification, the driver appeared disoriented, the driver was arrested for possessing contraband in his car, the car was impounded, the driver had no trunk key and the trunk lid had no lock), the raising of the trunk lid was a reasonable intrusion, limited to the extent necessary for any inventory search, *i.e.*, to protect the police from danger [*Cooper* v *California*, 386 US 58; 87 S Ct 788; 17 L Ed 2d 730 (1967)], to protect defendant's property [*Harris* v *United States*, 390 US 234; 88 S Ct 992; 19 L Ed 2d 1067 (1968)], and to protect the public [*Cady* v *Dombrowski*, 413 US 433; 93 S Ct 2523; 37 L Ed 2d 706 (1973)].

Defendant argued below that the trunk search was an invalid inventory search, and occurred without probable cause. Arguably, the trunk search was based on probable cause which the United States Supreme Court may find "self-evident" in this case as it did in *Colorado* v *Bannister*, 449 US 1; 101 S Ct 42; 66 L Ed 2d 1 (1980). The limited frisk of the car leading to defendant's probable cause arrest for possession of marijuana seized from inside the car could justify the deputy's belief that he could search the entire car including the trunk for more contraband. *United States* v *Ross; supra;* and *Michigan* v *Thomas, supra.*

In *Ross, supra*, the scope of the warrant exception established in *Carroll* v *United States* permitting a warrantless vehicle search based on probable cause, also included the search of the car trunk. This Court said:

> "Moreover, the probable cause determination must be based on objective facts that could justify the issurance of a warrant by a magistrate and not merely on the subjective good faith of the police officers. '"[A]s we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the [officer], which in the judgment of the court would make his faith reasonable."' *Id.*, at 161-162 (quoting *Director General* v. *Kastenbaum*, 263 U.S. 25, 28)fn [10]

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fn [10]

"After reviewing the relevant authorities at some length, the Court concluded that the probable cause requirement was satisfied in the case before it. The Court held that 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.' *Id.*, at 162. Cf. *Brinegar* v. *United States*, 338 U.S. 160, 176-177; *Henry* v. *United States*, 361 U.S. 98, 102."

"In short, the exception to the warrant requirement established in *Carroll*—the scope of which we consider in this case—applies only to searches of vehicles that are supported by probable cause. In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.

United States v Ross, 31 CrL 3054 (Footnotes 11 & 12 omitted)

and further:

"The exception recognized in *Carroll* is unquestionably one that is 'specifically established and well-delineated.' We hold that the scope of the warrantless search authorized by that exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. *If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.*"

United States v *Ross*, 31 CrL 3058 (emphasis added)

In *Michigan* v *Thomas, supra*, this Court summarily reversed a Michigan Court of Appeals decision. In *Thomas*, the state appeals court held that the properly impounded vehicle (following defendant's arrest for open intoxicants in the car) was subjected to an inventory search that was "unreasonable in scope" ' and further, that the subsequent search of the vehicle air vents, after finding marijuana in the unlocked glove compartment during the inventory search, was invalid as being without "exigent circumstances". (31 CrL 4104). This Court succinctly held:

"We reverse. In *Chambers* v. *Maroney*, 399 U.S. 423 (1970), we held that when police officers have probable cause to believe there is contraband inside an automobile

that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody. We firmly reiterated this holding in *Texas* v. *White*, 423 U.S. 67 (1975). See also *United States* v. *Ross*, ..., U.S. ...., ..., n. 9 (1982). It is thus clear that the justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant. See id.

"Here, the Court of Appeals recognized that the officers were justified in conducting an inventory search of the discovery of contraband. Without attempting to refute the State's contention that this discovery gave the officers probable cause to believe there was contraband elsewhere in the vehicle, the Court of Appeals held that the absence of 'exigent circumstances' precluded a warrantless search. This holding is plainly inconsistent with our decisions in *Chambers* and *Texas* v *White*.

The petition for certiorari and the motion of respondent to proceed in forma pauperis are granted, the judgment of the Michigan Court of Appeals is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion. It is so ordered."

Michigan v *Thomas*, 31 CrL 4104

In this case, even without the initial armrest frisk,[3] the valid impoundment and the cusory inventory search of the ditched car[4] was within the scope of the inventory search in *Michigan* v *Thomas*. Such an inventory search would have disclosed the marijuana under the armrest and in the trunk, per *Michigan* v *Thomas*. In this case, if the armrest marijuana was validly seized, the armrest marijuana here (like the glove-box marijuana in *Michigan* v *Thomas*) supplied probable cause for the trunk search here (like the air vent search in *Michigan* v *Thomas*).

The arrest of defendant for possessing marijuana in the car and the impoundment of his car were valid, and the search of defendant's car trunk whether on probable cause, or as a valid protective and caretaking inventory search, was appropriate.

CONCLUSION

Petitioner asks this Court to reverse the judgment of the Michigan Supreme Court in *People* v *Long*, 413 Mich 461; 320 NW2d 866 (1982) for the reasons given above. Petitioner submits that the "armrest" frisk comported with the scope of the *Terry* v *Ohio* "stop and frisk" rationale, and that the inventory search of the car trunk was reasonable under the Fourth Amendment.

---

[3]

Conceivably, defendant could have been arrested *in 1977* for speeding [a misdemeanor per MCL 257.628(d); MSA 9.2328(4)], lack of proper vehicle identification (a possible misdemeanor per MCL 257.215; MSA 9.1915, and MCL 257.223; MSA 9.1923), driving while intoxicated (per MCL 257.625; MSA 9.2325), or reckless driving (a misdemeanor per MCL 257.626; MSA 9.2326).

[4]

Cf., *South Dakota* v *Opperman*, 428 US 364, 368-369; 96 S Ct 3092; 49 L Ed 2d 1000 (1976).

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No. 82-256

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

vs.

DAVID KERK LONG
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

I. Whether the Michigan Supreme Court correctly decided that a warrantless search of a traffic violator's car violated the state and federal Constitutions.

II. Whether the Michigan Supreme Court correctly decided that evidence discovered in a search undertaken because of evidence obtained by unlawful police action should have been suppressed.

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STATEMENT OF FACTS

On August 25, 1977, two Barry County, Michigan, Sheriff's deputies pursued a speeding car, without activating their siren or emergency lights (10a-11a, 21a-23a, 75a-77a, 90a). The car soon swerved and stopped with its front in a shallow ditch, its back on the roadway and its passenger's side toward the deputies (10a-11a, 77a-78a, 90a-91a, 108a-110a). When the deputies activated their emergency lights, David Long, the car's only occupant, left the driver's seat and met the deputies by the trunk (11a-12a, 24a, 47a, 78a-79a, 90a-91a). Long appeared unsteady, disoriented and "under the influence of something" (25a-26a, 119a), but he was cooperative at all times (24a-25a, 120a). He produced his driver's license after being asked for it twice (11a, 47a-48a, 79a).

Long was asked twice for the car's registration and proof of insurance. Without speaking, he walked toward the open driver's door (11a, 48a, 79a). The deputies then retrieved a large, closed folding knife, one of many tools on the floor of the "messy" car (12a-13a, 26a-27a, 49a, 80a, 92a, 110-111a, 120a). No claim was made that the "buck" knife was contraband. Long was not charged with a weapons offense (43a, 97a; *People* v *Long*, 413 Mich 461, 469 n.1; 320 NW2d 866, 868 n.1 (1982). Long was frisked after the knife was seized. Although no weapons were found (12a-13a, 29a, 49a, 104a, 111a-112a), one of the deputies then held him while the other searched the interior of the car, ostensibly for weapons (12a-13a, 33a). The car's papers may have been found at this time (51a-52a). The deputies said they searched the interior of the car for weapons because they were going to permit Long to get in to retrieve the registration (35a), which they thought was in the glove box (41a). They acknowledged that no search would have been needed if they had asked Long where the registration was and retrieved it themselves (41a).

Although a hammer and screwdriver were among the tools scattered about the car (26a, 92a, 120a), the search for

weapons was concentrated on a leather object protruding slightly from beneath a folded-down armrest (13a, 81a-82a, 93a-94a, 121a). Deputy Howell lifted the armrest and removed a leather, pocket-sized wallet. He removed the wallet from the car and opened it, taking out a plastic bag containing marijuana (13a, 81a, 84a, 94a, 97a, 112a, 114a).

Long was arrested for possession of marijuana (14a, 84a). (He was later given a ticket for speeding which was eventually rescinded (42a-43a, 97a).) Deputy Howell then searched the car for other contraband (14a, 85a-86a). Long did not have a key to the trunk, so one deputy forced the keyless latch with his pocket knife. He found 75 pounds of marijuana (14a-16a, 19a-20a, 39a-40a, 85a-87a, 89a).

Deputy Howell searched the trunk looking for contraband and because he had a personal policy of checking for valuables in cars he intended to impound. He testified "we do not have an inventory search" in the Sheriff's Department (15a-17a).

The car was towed to the Sheriff's garage where it was left overnight with the marijuana in it (20a, 53a, 87a-88a, 116a-118a). No written inventory was produced at trial and the deputies could not testify precisely about the car's contents (27a, 92a, 120a).

Long moved to supress the marijuana found in the searches of the car. The prosecution never tried to justify these searches as "probable cause" or "incident to arrest" searches. *People* v *Long*, 413 Mich 461, 472, 481 n.2; 320 NW2d 866, 869-70, 873 n.2 (1982). It claimed the initial search of the vehicle was a protective search under *Terry* v *Ohio*, 392 US 1 (1968), and that the trunk search was an inventory search under *South Dakota* v *Opperman*, 428 US 364 (1976).

Long was convicted of possession of marijuana and appealed. His conviction was affirmed by the Michigan Court of Appeals. *People* v *Long*, 94 MichApp 338; 288 NW2d 629 (1979). The Michigan Supreme Court reversed,

saying the case did not come within the narrowly-drawn exceptions to the warrant requirements of the state and federal constitutions. *People* v *Long*, 413 Mich 461; 320 NW2d 866 (1982). Since the trunk search was made because of evidence found in the search of the car's interior, the evidence found in the trunk was suppressed as "fruit of the poisonous tree." *Wong Sun* v *US*, 371 US 471 (1963).

SUMMARY OF ARGUMENT

The limited, narrowly-construed exceptions to the Fourth Amendment's warrant requirement should not be expanded. There is no sound reason of public policy that would justify extending the rule of *New York* v *Belton*, 453 US 454 (1981) to protective searches. The reasons for permitting an extensive post-arrest search of the vicinity of a criminal defendant are not present in traffic stops or brief detentions on less than probable cause.

Expansion of *Terry* v *Ohio*, 392 US 1 (1968) would result in the scope of protective searches being broader than searches made incident to arrest. Expansion of the protective search rationale is not justified by the dangers of police work. The privacy interest in automobiles is significant and the Fourth Amendment's protections of automobiles ought not to be abandoned, or further diluted.

No compelling circumstance made the warrantless searches on less than probable cause necessary in this case. They were not valid *Terry* searches because Long had not given the deputies reason to believe that he was a danger to them. He was cooperative and not belligerent, aggressive or threatening in word or gesture.

A potentially dangerous, but ordinarily innocent, object in the vicinity of investigating officers is not alone reason to believe that a traffic violator nearby is dangerous. Many objects that can be lawfully possessed and are ordinarily present in automobiles could be used to injure investigating

officers. Extension of *Terry* to permit searches when those objects are present would, as a practical matter, make every traffic violator or *Terry* detainee in the vicinity of a car, subject to a search of his automobile without probable cause.

Cases cited by Petitioner and Amici in which protective searches of automobiles were upheld are distinguishable, either because the investigating officers in those cases had ample reason to believe the parties they were investigating were connected with a violent crime or because the defendants had been observed in the act of concealing objects in automobiles.

The "protective" search of Long's car was a pretext for a search for evidence. The deputies never testified they were in fear of bodily harm from Long, or that he had done anything to indicate that he presented a danger to them. They ignored a hammer, a screwdriver and other objects in the car which could have been used to injure them, while closely scrutinizing a billfold-sized leather object under an armrest on the front seat. At the time of their search, both deputies were between Long and the door. They would not have permitted him to gain re-entry to the car.

The Michigan Supreme Court never reached the question of whether the trunk search was a lawful inventory search. Under Michigan law, other possible justifications for the search could not have been raised in the Supreme Court because they were not raised below. This case presents an inappropriate vehicle for the Court to determine the issues raised here, but not reached below.

South Dakota v *Opperman*, 428 US 364 (1976) is inapposite. The Barry County Sheriff's Department had no inventory search procedure. No written inventory was ever prepared. The search was conducted in places other than where valuables are usually stored. The inventorying officer had an investigatory motive and the inventory was stopped when contraband was found.

There was no need to impound the car or to inventory it at the Sheriff's Department. Other arrangements could have been made for its removal from the side of the roadway or it could have been lawfully parked there. Absolutely safe and secure storage facilities were available and there was no reason to inventory the car because of risk of theft or intrusion by vandals.

Certiorari was improvidently granted. The decision of the Michigan Supreme Court rests on an adequate state law ground. Michigan Courts have consistently imposed a higher standard under the state constitutional provisions relating to search and seizure than this Court has imposed under the Fourth Amendment. The Court lacks jurisdiction to hear the case.

ARGUMENT

I. THE "STOP AND FRISK" EXCEPTION TO THE WARRANT REQUIREMENT SHOULD NOT BE EXTENDED.

A. The "stop and frisk" exception to the warrant requirement should not be extended as a matter of general policy.

1. *Exceptions to the warrant requirement are very limited.*

"[I]t is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' " *Mincey* v *Arizona*, 437 US 385, 390 (1978), citing *Katz* v *US*, 389 US 347, 357 (1967).

"The exceptions [to the Warrant requirement] are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'

'[T]he burden is on those seeking the exemption to show the need for it.' " *Coolidge* v *New Hampshire*, 403 US 443, 455 (1971).

Narrow construction of exceptions to the Fourth Amendment's warrant requirement is a fundamental principle of Fourth Amendment analysis. *Arkansas* v *Sanders*, 442 US 753, 759-760 (1979); *Vale* v *Louisiana*, 399 US 30, 34 (1970); *Jones* v *US*, 357 US 493, 499 (1958).

One of the most narrowly construed exceptions to the warrant requirement has been the "stop and frisk" exception of *Terry* v *Ohio*, 392 US 1 (1968).

Dunaway v *New York*, 442 US 200, 210 (1979) stressed the limited holding of *Terry*:

"Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope."

Ybarra v *Illinois*, 444 US 85, 93 (1979) said:

"The *Terry* case created an exception to the requirement or probable cause, an exception whose 'narrow scope' this court 'has been careful to maintain.' "

2. Terry searches are limited in scope.

Dunaway v *New York*, 442 US 200, 210 (1979) said that *Terry*:

"defined a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test."

See also *Michigan* v *Summers*, 452 US 692, 697-698 (1981).

"Nothing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or, indeed,

any search whatever for anything but weapons." *Ybarra* v *Illinois*, 444 US 85, 93-94 (1979).

Against this background, Petitioner and Amici urge expansion of the *Terry* exception to permit police officers to make searches similar in scope to searches incident to arrest permissible under *New York* v *Belton*, 453 US 454 (1981).

3. The Belton rationale does not apply to Terry searches.

The presence of this case before the Court is another example of "the 'tendency of a principle to expand itself to the limit of its logic'—and perhaps beyond." *US* v *Borelli*, 336 F2d 376, 380 (2d Cir. 1964), cert den 379 US 960 (1965) (quoting Cardozo, Nature of Judicial Process, p. 51). Although a search incident to arrest serves different purposes than a *Terry* search, the Court is now urged to extend *Belton* to stops on less than probable cause.

A search incident to arrest serves two purposes: (1) "to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape" and (2) "to prevent the concealment or destruction of evidence." *New York* v *Belton*, 453 US at 457.

A *Terry* search "is not justified by any need to prevent the disappearance or destruction of evidence of crime." *Terry* v *Ohio*, 392 US 1, 29 (1968). *Terry* does not allow "any search whatever for anything but weapons." *Ybarra* v *Illinois*, 444 US 85, 93 (1979).

In many cases an officer who has probable cause to make a custodial arrest will also have probable cause to believe that evidence of crime will be in a vehicle recently occupied by the defendant. A search for that evidence would be proper under *US* v *Ross*, 102 S Ct 2157 (1982). By definition, probable cause is lacking where *Terry* is the only justification for a warrantless search.

The need for an intense search of an arrestee for weapons may be justification for the adoption in *Belton* of what Justice Brennan correctly characterized as a fiction, i.e.:

> "that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car." *New York* v *Belton*, 453 US 454, 466 (1981). (Brennan, dissenting)

The *Terry* search fills a different need:

> "The need is only to find implements which could readily be grasped by the suspect during the brief face-to-face encounter, not to uncover items which are cleverly concealed and which could be brought out only with considerable delay and difficulty." 3 W. LaFave, Search and Seizure §9.4, p. 127 (1978).

A principal reason advanced for expanding *Terry* to permit car searches is that detainees will be permitted to return to their cars after the police have determined that no criminal activity is afoot or after a traffic citation has been issued. The lack of motive for escape or injury to the officer makes the hypothetical danger presented by a released *Terry* detainee or traffic violator seem unlikely.

> "[I]f a person is stopped for running a stop sign, it hardly seems plausible to suggest that after he is ticketed and returns to his car he will then seize a gun and try to overtake the police car and shoot the officers. And even if the stop concerned a suspicion of more serious conduct, such as because some of the occupants in the car were seen following a pedestrian, it does not seem likely that the suspects would have any motive to fire on the police if they are released from custody after those suspicions were not confirmed . . ." 3 W. LaFave, Search and Seizure §9.4, p. 137 (1978).

Application of the logic of *New York* v *Belton*, 453 US 454 (1981) would bring a certain summetry and simplicity to

search and seizure law. It is a symmetry not compelled by the logic of the Court's decisions.

> "Viewing similar facts from entirely different perspectives need not lead to identical results." *Robbins* v *California*, 453 US 420, 430 (1981). (Powell, concurring)

Extension of *Belton* to *Terry* searches would ignore the absence in this case of the considerations supporting the *Belton* rule while greatly restricting the privacy interests of citizens under the Fourth Amendment.

The Court should not bring the hindquarters of the camel into the tent simply because it let the animal get its nose under the flap in *Terry*.

4. Expansion of Terry will yield anomolous results.

Extension of *Terry* to permit warrantless searches of places detainees may go to after they are released would yield anomolous results.

If the police can search a car of a suspected traffic offender because the offender is to return to it, why should they not also be permitted to search the house of a pedestrian detained under *Terry* on his front doorstep. After his release, the detainee might walk through the front doorway and obtain a pistol concealed inside the house. The statistics cited to the Court by Amicus show that a significant number of officers killed in the line of duty are shot answering domestic disturbance calls.

If Officer McFadden had questioned Defendant Terry on the sidewalk in front of a bar, ought he not to have been permitted to search the bar for weapons on the theory that Terry might go there and obtain a weapon from a compatriot if he was released?

If the *Terry* search is expanded as Petitioner urges, then police will be able to undertake searches broader than those permissible as searches incident to arrest. Police cannot search the home of an arrestee taken into custody on his

front doorstep. *Vale* v *Louisiana*, 399 US 30, 35 (1970). The scope of a search incident to arrest made in a house cannot extend to the defendant's car in a driveway next to the house. *Coolidge* v *New Hampshire*, 403 US 443 (1971). *Ybarra* v *Illinois*, 444 US 85, 91 (1979) held that police cannot search occupants of a bar in the course of executing a search warrant on the premises. Presumably they could not search all occupants of a bar if they executed an arrest warrant in the bar or on the sidewalk outside it.

Terry authorizes the search of a person, not the places he has been or the places he might go to. If the Court yields to the urgings of Petitioner and Amici to expand the exception of the warrant requirement formulated in *Terry*, then the Court will have found "an exception that would swallow the general rule." *Michigan* v *Summers*, 452 US 692, 697 (1981).

5. The dangers of police work do not justify judicial repeal of the Fourth Amendment.

Petitioner and Amici effectively argue that police work remains as hazardous an occupation as it has always been. They cite distressing statistics demonstrating the hazards peace officers face in their contacts with the public, including their contacts with traffic law violators. However, it is one thing to decline "to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations," *Pennsylvania* v *Mimms*, 434 US 106, 110 (1977). It is quite another thing to accept the argument that Fourth Amendment protections should be further diluted because investigation of traffic violations involves risk.

It has not been demonstrated that traffic stops are more hazardous than other contacts with the public. After all, saying that 30 percent of police shootings involve suspects in automobiles is another way of saying that 70 percent of police shootings involve suspects not in automobiles. Without knowing what percentage of police contacts with the

public involve traffic stops, it is impossible to say from the statistics presented whether traffic stops are more or less dangerous than other contacts.

Even if the decision in this case were one of legislative judgment rather than constitutional interpretation, it seems unlikely that the rule urged by Petitioner and Amici would significantly reduce the risk to police officers investigating traffic offenses. Thousands of traffic stops are made daily. Amicus acknowledges that "there is no way officers can identify in advance which suspects are likely to be dangerous." Brief of Gulf & Great Plains Legal Foundation, p. 9. The danger to the 30 percent of police officers killed in the line of duty *approaching* automobiles will not be lessened by authorizing warrantless searches of unoccupied cars of suspects who have left their cars and identified themselves to the police.

6. There is a significant privacy interest in automobiles.

It is suggested that a "diminished expectation of privacy" in automobiles is reason to justify their warrantless search on less than probable cause. The suggestion seems contrary to the holding of *Almeida-Sanchez* v *US*, 413 US 266, 269 (1973):

> "[that] the *Carroll* [v *United States*, 267 US 132 (1925)] doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search."

Delaware v *Prouse*, 440 US 648, 663 (1979) rejected the notion that Fourth Amendment protections should be fewer for citizens in automobiles than for others, saying:

> "As *Terry* v *Ohio*, supra, recognized, people are not shorn of all Fourth Amendment protection when they step from their homes or to the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles."

> "The word automobile is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge* v *New Hampshire*, 403 US 443, 462 (1971).

US v *Ross*, 102 S Ct 2157, 2172 (1982) refused to draw a distinction between "worthy" and "unworthy" containers. The Court should resist the notion that the private contents of motor vehicles are less worthy of protection than other "effects" protected by the Fourth Amendment.

The diminished expectation of privacy in automobiles arises because the "configuration, use and regulation of automobiles" make them less likely to be "private" than other properties. *Arkansas* v *Sanders*, 442 US 753, 761 (1979).

The Court has noted that a car travels "public thoroughfares where both its occupants and its contents are in *plain view*." *Cardwell* v *Lewis*, 417 US 583, 590 (1974) (plurality opinion) (emphasis added). There are extensive regulations governing the condition and manner in which motor vehicles can be operated on public streets. *Cady* v *Dombrowski*, 413 US 433, 441 (1973). Automobiles periodically undergo official inspection and are occasionally taken into police custody. *South Dakota* v *Opperman*, 428 US 364, 368 (1976). In short, cars are sometimes not "private." However:

> "It hardly follows that from the fact that the police may examine the license plates and headlights of a person's car that he has a reduced expectation of privacy in the glove compartment or in the trunk of his car." Kamisar, Y., Recent Developments in Constitutional-Criminal Procedure, Michigan Institution of Continuing Legal Education, p. 9 (1982).

Reduced to its basics, the argument of Petitioner and Amici is that the Court has authorized so many exceptions to the warrant requirement regarding automobiles that creating one more won't hurt.

In his dissent in *Terry* v *Ohio*, 312 US 1, 39 (1968), Justice Douglas warned of the "powerful hydraulic pressures" which "bear heavily on the Court to water down constitutional guarantees." Those pressures are evidently still at work.

7. An automobile search is a serious intrusion on personal privacy.

The Government suggests an additional exception to the warrant requirement is reasonable because, in its view, rummaging through Long's personal effects was a less serious intrusion upon his Fourth Amendment rights than patting him down for weapons. There are two things wrong with the Government's analysis. First, no one asked Long which intrusion he regarded as more serious. Secondly, exceptions to the warrant requirement are not made based on the intrusiveness of the search authorized. They are made based on the need for the search in view of the exigencies involved. *Coolidge* v *New Hampshire*, 403 US 443, 479 (1971).

In *Terry* v *Ohio*, 392 US 1 (1968), the Court was at pains to point out that an invasion of privacy the police regard as trivial is often a matter of great indignity to the citizen intruded upon. The Government stands *Terry* on its head by arguing that because, in its view, the intrusion on Long's Fourth Amendment right "to be secure in . . . [his] effects" was less onerous than its invasion of his right "to be secure in [his] person," he has no cause to complain.

Terry did not set up a system for grading invasions of Fourth Amendment rights. It did not authorize trivial or even "moderate" violations of the consitution. *Terry* announced a limited exception to the warrant requirement, saying:

> "A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation." *Terry* v *Ohio*, 392 US 1, 25-26 (1968).

As will be discussed more fully below, there were no exigencies involved in this traffic stop which necessitated the search conducted.

The unsupported assumption that citizens will be happier about police searches of their personal effects than police searches of their persons is not a basis for further expanding the limited exception to the warrant requirement announced in *Terry*.

B. This case presents no reason for extension of the "stop and frisk" exception to the warrant requirement to automobiles near detainees.

1. Frisking Long was not justified under Terry.

"The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case." *Sibron* v *New York*, 392 US 40, 59 (1968).

There are no facts in this case which justify the search of Long or the car he was driving. Although the deputies found an object which might have been used as a weapon, they never testified that they thought Long was dangerous.

Before a *Terry* search may be made, there must be specific articulable facts to show not only that a detained citizen may be armed, but that he presents a *danger* to the police. 3 W. LaFave, Search and Seizure, §9.4, p. 114 n.17.

> "The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. In the case of a self-protective search for weapons, he must be able to point to particular facts from which he has reasonably inferred that the individual was armed and dangerous." *Sibron* v *New York*, 392 US 40, 64 (1968).

Long was cooperative at all times (24a, 120a). He never threatened the officers, either in word or gesture. He had not given the officers any cause to draw their weapons or to take him to the squad car (34a). He produced his license when asked (11a, 47a-48a, 79a). When told to stop and put his hands on the car, he complied (12a, 31a, 80a, 110a-111a). After he was told he was under arrest, Long gave the deputies the key to the car when asked (15a, 39a). Even after the knife was discovered in the car, the most serious offense the deputies wanted to investigate was speeding (30a-31a). The frisk of Long showed that he was unarmed (29a). The knife found in the car was closed when Deputy Lewis picked it up (49a, 80a, 110a-111a). Long was behind the rear wheel of the car with both deputies between him and the door after the knife was found (102a-104a). Although Petitioner and Amici have suggested that Long might have been charged with a laundry list of offenses, he was not charged with driving under the influence, public intoxication, reckless driving or any other offense. He was arrested for possession of marijuana and he was given an appearance ticket for speeding (42a, 43a, 97a).

One of the deputies did testify that he was "concerned" about Long (34a). Police officers are trained to be cautious and concerned about everyone they come in contact with. Brief of Amicus Gulf & Great Plains Legal Foundation, p. 9. When being questioned about his degree of concern, Deputy Howell testified: "I didn't completely ignore him." (34a) He *assumed* that Deputy Lewis was near Long (102a). The deputies felt it was unnecessary to handcuff Long immediately upon his arrest. That was not done until after he had given them the key they had asked for and the marijuana in the trunk had been found (20a).

A number of factors have been mentioned as possible justifications for a search of the car. The traffic stop was made in a relatively unpopulated rural area. It was nighttime. Long had been speeding. He had been involved in an accident. He acted like someone who had been in an

accident, i.e. confused and disoriented. He may have been intoxicated. His response to questions was slow. There was an object in plain view in the car he had left (a knife) which was lawful for him to possess but which might have been used in a way to injure the officer.

Many of these factors are involved in a great many traffic stops. There is nothing unusual about them and nothing to suggest any particular danger to the officer. The United States admits that most of them would not support a search of the car. Brief of Solicitor General, p. 12.

It would be hard to find a part of Barry County not rural and isolated. There is no reason to believe that Michiganders become more prone to violence after the sun goes down. Violations of traffic laws and accidents are common. They are not usually crimes associated with violence or the use of dangerous weapons. Driving under the influence of intoxicating liquor or drugs is, unfortunately, an everyday occurrence. (The deputies never seriously regarded Long as a drunk suspect. He was not given dexterity or sobriety tests or charged with drunk driving. There was no testimony showing that he looked intoxicated, i.e. that his eyes were bloodshot, his speech was slurred, etc. His confused behavior was as easily attributable to the fact that he had just been in an accident as it was to anything else.)

Since Long was cooperative, never threatened the deputies, and never made any effort or movement which suggested to them that he was going to hurt them, the only factor of significance to the automobile search is the presence of the closed buck knife in the car. That was the reason given for the search (12a).

2. The presence of a potentially dangerous, but legal, object in a car does not justify a Terry search.

If the presence of potentially dangerous objects near a motorist detained on a traffic violation is justification for a *Terry* search of his car, then every motorist stopped on the

highways of this nation will be subject to search. Nearly anything that can be transported in a car—and even the car itself—can be used to inflict harm.

People use cars to transport their personal effects, the tools of their trades, sporting equipment and a wide variety of objects that could be used as weapons. Coincidentally, Deputy Howell had a pocket knife the night of Long's arrest (16a, 86a). The car Long was driving had screwdrivers, hammers and other legal but potentially dangerous objects in it which Deputy Howell ignored in his search (26a, 92a, 121a).

The buck knife in this case was legal. See MCLA 750.227; MSA 28.424; *People* v *Iverson*, 34 MichApp 519 (1971). Ones like it are popular and used for many lawful purposes. Norman, G., *Blue-Chip Blades*, Esquire, August, 1980, at 40; Petzel, D., *Once Again, I * XL*, Mechanic's Illustrated, March, 1981, at 140; Murphy, B., *A Buster of a Folding Knife*, Mechanic's Illustrated, November, 1980, at 86; *Knife Know-How*, Mother Earth News, July/August, 1981, at 152.

The most commonplace items have been found to be deadly or dangerous weapons. *State* v *Belfiglio*, 134 SW 508 (Mo. 1911) (Steel screwdriver). *Fox* v *State*, 556 P2d 1281, 1284 (Ok. 1976) (hammer). *People* v *Russell*, 139 P2d 661, 663 (Cal. Ct. App. 1943) (fingernail file). *State* v *Lawson*, 227 SW2d 642, 644 (Mo. 1950) (rock). *People* v *Shaffran*, 243 Mich 527; NW 716 (1928) (stone). *Johnson* v *State*, 409 NE2d 699, 701 (Ind. Ct. App. 1980) (scissors). *State* v *Bustamonte*, 593 P2d 659 (Ariz. 1979) (scissors). *Bowers* v *People*, 617 P2d 560, 563 (Colo. 1980) (bottle). *State* v *Leak*, 306 So2d 737, 739 (La. 1975) (socket wrench handle). *People* v *Spagnola*, 260 NE2d 20, 28 (Ill. App. Ct. 1970) (billiard cue).

A flashlight, a broomstock, a cigarette lighter and a booted foot have all been found to be dangerous weapons in Michigan. *People* v *Buford*, 69 MichApp 27, 30; 244 NW2d 351 (1976).

In *People* v *Goolsby*, 284 Mich 375; 279 NW 867 (1938), the Defendant was stopped for a traffic offense. He got out of his car, returned to it and used the car to assault the officer. He was convicted of assault with a dangerous weapon.

Terry represented a significant departure from traditional Fourth Amendment analysis. *Dunaway* v *New York*, 442 US 200, 209-210 (1979). It was announced as a limited exception to the warrant requirement. It has repeatedly been referred to as an exception narrow in scope. If it is expanded to permit searches of motor vehicles of persons detained for traffic violations because the car, or the legal objects it contains, might be used to injure the officer, then there will be more exception than rule. Each of the thousands of people detained daily in this country for traffic violations will be subject to search, not incident to any arrest or based upon probable cause. The presence of a potentially dangerous object in the vicinity of a traffic offender cannot justify a warrantless search. There must also be a specific articulable reason to believe that the detainee is dangerous.

3. Cases which have permitted protective searches of automobiles are distinguishable.

Petitioner, Amici and the dissenters in the Michigan Supreme Court have cited cases in which courts have upheld warrantless searches of automobiles as protective searches permitted under *Terry* v *Ohio*, 392 US 1 (1968). The facts presented in those cases differ markedly from the situation that presented itself to Deputies Howell and Lewis.

When Deputies Howell and Lewis searched Long, they had no reason to believe that he had been involved in an on-going, violent feud of some kind. Cf. *US* v *Rainone*, 586 F2d 1132 (7th Cir. 1978), cert den 430 US 980 (1979), *US* v *Powless*, 546 F2d 792 (8th Cir.), cert den 430 US 910 (1977); *contra Louisiana* v *Greenwald*, 369 So2d 1317 (1979). They

had no reason to believe that Long was wanted on an outstanding warrant or in connection with a murder investigation. Cf. *State* v *Gilchrist*, 299 NW2d 913 (Minn. 1981); *US* v *Powless*, supra. They had no reason to believe that Long might have been planning, or had recently participated in, a robbery. Cf. *Brown* v *State*, 358 So2d 596 (Fla. Dist. Ct. App., 1978); *Uptegraft* v *State*, 621 P2d 5 (Ala. 1980); *US* v *Thomas*, 314 A2d 464 (DC, 1974). They had no reason to suspect that he had been involved in a recent shooting. Cf. *Williams* v *State*, 310 A2d 593 (Md. Ct. Spec. App., 1973); *Maine* v *Darling*, 393 A2d 530 (1978).

Long had not been observed making any furtive gestures as if he were concealing something when the officers approached. Cf. *Brown* v *State*, supra; *Commonwealth* v *Almeida*, 366 NE2d 756 (Mass. 1977); *State* v *Brown*, 389 A2d 507 (NJ Super. Ct. Law Div., 1978); *US* v *Green*, 456 F2d 620 (DC 1972); *US* v *Thomas*, 314 A2d 464 (DC, 1974); *contra Louisiana* v *Greenwald*, supra.

Long's case is more like *Canal Zone* v *Bender*, 573 F2d 1329 (5th Cir. 1978); *City of Portland* v *Poindexter*, 590 P2d 781 (Or. Ct. App. 1979); *Tyler* v *US*, 302 A2d 748 (DC, 1973); and *State* v *Gannaway*, 191 NW2d 555 (Minn., 1971). In each of those cases, courts have refused to permit a search of a traffic offender's car, where the only crime the officers suspected the defendant may be associated with was a traffic offense, even where the defendant was nervous or upset.

As a matter of Michigan law, Deputies Howell and Lewis could not have searched the car Long was driving simply because he was stopped for a traffic offense. *People* v *Zeigler*, 358 Mich 355; 100 NW2d 456 (1960); *People* v *Nelson Pitts*, 40 MichApp 567, 571-572; 199 NW2d 271, lv den 388 Mich 791 (1972); *People* v *Lee*, 371 Mich 563, 124 NW2d 736 (1963); *People* v *Ridgeway*, 74 MichApp 306, 312, 253 NW2d 743, lv den 401 Mich 831 (1977); *People* v *7th District Judge*, 55 MichApp 471, 476, 222 NW2d 778 (1974).

The evidence against Long could only be admitted if the search of his car was justifiable under *Terry*. The articulable facts supporting a reasonable belief that Long was dangerous are missing in this case and, therefore, the evidence found in the search of his car was properly suppressed.

4. The search for weapons was a pretext.

In *Sibron* v *New York*, 396 US 40, 46 (1968), the Court refused to uphold the search of a detainee that resulted in the discovery of heroine because the officer did not "seriously suggest that he was in fear of bodily harm and that he searched Sibron in self-protection to find weapons." The arresting officer was so little concerned about weapons that he did not pat down Sibron. Id at 65. Cf. *US* v *Rainone*, 586 F2d 1132, 1138 (7th Cir. 1978), which distinguished *Canal Zone* v *Bender*, 573 F2d 1329 (5th Cir. 1978), by noting that the investigating officers were so unconcerned about safety that they did not pat down the defendants before searching their car.

Deputies Howell and Lewis never seriously suggested that they were in fear of bodily harm from Long. He was cooperative at all times. He had made no threats. He did what he was told. Even after the knife was discovered, the deputies considered his detention a traffic stop (31a).

The deputies ignored tools, including a hammer and screwdriver, in their "search for weapons," concentrating instead on a barely-visible leather object under an armrest on the front seat (121a). Common sense should have indicated to the deputies that neither the knife nor other items in plain view in the car were contraband:

> "Contraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view . . ." *US* v *Ross*, 102 S Ct 2157, 2170 (1982).

The ostensible reason for searching the car "for weapons" was to permit Long to get in it to find the

registration (35a), although after finding the knife the deputies may not have let Long back into the car under any circumstances (54a, 121a). There is also testimony that the car's papers may have been the *first* thing the deputies found in looking through the car (51a). They also believed that the registration was probably in the glove compartment where they could have easily obtained it without searching the car by asking Long where it was (40a-41a).

In light of the fact that they thought Long might be "under the influence of something" (25a) and that he acted like someone who might have "open intoxicants in the car," it seems more likely that their search was prompted by a desire to find contraband than it was to protect themselves.

II. THE SEARCH OF THE TRUNK WAS NOT A BONA FIDE INVENTORY SEARCH.

A. The propriety of the trunk search involves controlling issues of state law.

The Michigan Supreme Court never reached the question of whether the trunk search was a lawful inventory search. It never considered whether it was lawful as a search incident to arrest or as a probable cause search since neither of those grounds had been advanced by the prosecution, and Michigan law precludes consideration of issues not raised in the lower courts. *Dwelley* v *Tom McDonnell, Inc*, 334 Mich 229, 233; 54 NW2d 217 (1952); *Ford* v *Howard*, 59 MichApp 548, 551; 229 NW2d 841 (1975). Even if it is assumed that *US* v *Ross*, 102 S Ct 2157 (1982), should apply retroactively to cases in which the issue has not been preserved on appeal, the appropriate course for this Court to take, if it decides to consider the trunk search, would be to remand the issue to the Michigan Supreme Court for consideration of applicable state law.

If the Michigan Supreme Court had reached the merits of the trunk search, its decision would have been governed

by controlling state precedent. Arrest for a traffic offense would not, under Michigan law, have justified searching the Defendant or impounding his car, particularly without first having given him the opportunity to post bond. *People* v *Dixon*, 392 Mich 691; 222 NW2d 749 (1974); *People* v *7th District Judge*, 55 MichApp 471, 476; 222 NW2d 778, 781 (1974); *People* v *Garcia*, 81 MichApp 260; 265 NW2d 115 (1978); and *People* v *Cavitt*, 86 MichApp 59; 272 NW2d 196 (1978); lv den 406 Mich 945 (1979).

The fact that the Defendant had not produced registration did not give the officers right to suspect that the vehicle was stolen or to search or impound it. *People* v *7th District Judge*, supra; *People* v *Marshall*, 25 MichApp 376, 379; 181 NW2d 578 (1970).

Even if the deputies had probable cause to believe that Long had committed misdemeanor (possession of marijuana), they would not, under Michigan law, have been able to search his car without first securing a warrant, since the misdemeanor was not committed in their presence. *People* v *Lolley*, 113 MichApp 567; 317 NW2d 342, lv den 413 Mich 919 (1982).

A custodial arrest of Long for speeding would not have been appropriate under Michigan law. See MCLA 257.727; MSA 9.2427. Under Michigan precedent, discovery of marijuana in the interior of the car would not have justified a search of the trunk. *People* v *Hilber*, 403 Mich 312, 329; 269 NW2d 159 (1978). There was no lawful basis for impounding the car under Michigan law.

B. The trunk search was not an inventory search.

The deputies testified that they had an investigatory motive for searching the trunk and that they had no standard procedure for inventories. Deputy Howell testified at the Preliminary Examination as follows (15a-17a):

"A. . . . At this time I took my pocket knife and reached in and unlatched the latch.

Q. Why did you do that?

A. It was unusual circumstances to me. Also we check the vehicle to make sure there is nothing, you know, that's valuable.

Q. And you do that in limited circumstances where there is no other person to drive the vehicle away?

A. Yes, sir.

Q. Is that standard policy?

A. It's my policy, yes.

The Court: What's your policy? I kind of missed that when a truck went by.

Mr. Howell: Yes, sir, we don't—I think what the prosecutor is getting at is an inventory search. We do not have an inventory search.

The Court: Alright so you opened the trunk?

Mr. Howell: Personally, well I can't speak for the other officers, myself I check the vehicle to make sure there's nothing of value in there that can be later claimed . . .

The Court: Alright, fine, but why did you open the trunk?

Mr. Howell: Number one, because I already found marijuana, suspected marijuana in the interior of the car, there may have been more in the trunk. Secondly, I checked them for valuables. I do."

A primary reason for Deputy Howell's search of the car, including the trunk, was to discovery additional contraband. Howell testified that after arresting Defendant for possession of the marijuana discovered in the interior of the car, he "checked the interior of the vehicle for further contraband" (85a) and that he "searched the car for any more suspected narcotics . . ." (14a).

In deciding whether a search is an "inventory" search, motivation for the inspection is a significant factor. Searching a vehicle for contraband is not an inventory search. *People* v *Martin*, 368 NYS2d 342, 348 (NY App. Div., 1975).

Where, as here, no written list of the items inventoried is made, the process of inventorying stops when contraband is found (19a-20a), the search is conducted in places other than where valuables are usually stored (i.e., the glove compartment), no standard procedure is followed and the investigating officer testifies that the search was undertaken to find contraband, there can be no finding of an "inventory" search. *State* v *McDaniel*, 383 A2d 1174, 1180 (NJ Sup. Ct. App. Div., 1978).

The District Court, the Circuit Court and the Court of Appeals upheld the search of the trunk as an "inventory search." All three Courts relied on *South Dakota* v *Opperman*, 428 US 364 (1976).

The reliance on *Opperman* was misplaced. In *Opperman*, *id* at 376, a plurality of the Court held that the inventory search of an automobile "following standard police procedures" was not "unreasonable" within the meaning of the Constitution. The Court carefully emphasized that the search was conducted in accordance with standard procedures, using a standard form and departmental routine. The Court referred to "standard" procedures at least five times in its opinion.

Opperman reviewed *Cady* v *Dombrowski*, 413 US 433 (1973) saying:

> "The Court carefully noted that the protective search was carried out in accordance with *standard procedures* in the local police department, . . . a factor tending to insure that the instrusion would be limited in scope to the extent necessary to carry out the cartaking function." (Emphasis in original) *South Dakota* v *Opperman*, 428 US at 374-375.

There was no suggestion that "this standard procedure . . . was a pretext concealing an investigatory police motive." *Id* at 376.

In this case, there were no guarantees that Deputy Howell's intrusion would be limited in scope. He had an investigatory motive. He was not bound or guided by any departmental policy. He made no written report of his actions. He could not describe the things he had supposedly inventoried for his own protection against claims of theft (26a). He sought no approval or authority for his actions. There was nothing "standard" about his procedure.

The rationale of "inventory searches" was discussed in *US* v *Chadwick*, 433 US 1 (1977). The Court said that in some automobile seizures, a warrantless search is permissible because:

> "Absolutely secure storage facilities may not be available, and the size and inherent mobility of a vehicle makes it susceptible to theft or intrusion by vandals." (Citations omitted) Id at 13 n. 7.

In this case, "absolutely secure" storage facilities were available. The care was secured in the basement of the Sheriff's garage (53a, 87a-88a, 116a-117a). The arresting officers were so certain that the car was safe from theft or intrusion by vandals that they left the 75 pounds of marijuana they had discovered in the trunk of the car (53a, 87a-88a, 116a-117a). Cf. *State* v *McDougal*, 228 NW2d 671, 678 (Wis. 1975).

Unlike Opperman, this Defendant was available to arrange to have the car transported. Nearly two hours went by while the deputies and the Defendant waited at the scene of their encounter for a tow truck to arrive (84a-85a). In that time, alternative arrangements could have been tried or the deputies could have sought a warrant.

C. A lawful inventory can only follow a lawful impoundment.

Many courts have held inventory searches to be a violation of constitutional rights when alternatives to impoundment are available or when the police fail to investigate alternatives.

State v *Hardman*, 567 P2d 238, 240 (Wash. Ct. App., 1977), held that the state must prove that no alternatives to impoundment exist before an inventory search will be upheld.

In *State* v *Bales*, 552 P2d 688, 690 (Wash. Ct. App., 1976), the Court said:

> "Impoundment of a citizen's vehicle following his or her arrest on a traffic charge is inappropriate when reasonable alternatives to impoundment exist."

State v *Slockbower*, 397 A2d 1050, 1053 (NJ, 1979), summarized cases from "a substantial and growing minority of jurisdictions" holding that impoundment and inventorying are impermissible procedures absent:

> "a factual showing of substantial police need, in the light of the consitutional regard for the privacy interests of automobiles' drivers . . ."

David Long was never asked if he wanted the car towed away by a wrecker of his choosing, or if he knew of someone who could be called to take the car away. He was not given the option of parking the car next to the roadway or in an appropriate nearby place. The car was not evidence and no Michigan statute authorized its impoundment. Instead, nearly two hours went by while all concerned waited for the tow truck and the vehicle was impounded.

The trunk search was not a valid inventory search.

III. THE DECISION BELOW IS SUPPORTED BY AN ADEQUATE STATE GROUND.

The Court should dismiss the Writ of Certiorari as improvidently granted. The decision of the Michigan Supreme Court is based on state law. Even if the Court should determine that the Michigan Supreme Court's interpretation of federal law was incorrect, its decision in this case would amount to well-considered dictum. Cf. *South Dakota* v

Opperman, 428 US 364 (1976); *State* v *Opperman*, 247 NW2d 673 (SD, 1976) (after remand).

> "[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp* v *Muller*, 296 US 207, 210 (1935).

The Michigan Supreme Court expressly grounded its decision on both the state and federal constitutions. See *People* v *Long*, 413 Mich 461, 471 n.4, 473; 320 NW2d 866, 869 n.4, 870 (1982). *People* v *Secrest*, 413 Mich 521, 525; 321 NW2d 368 (1982), noted differences in wording between the state and federal constitutional provisions regarding searches and seizures. The Court said:

> "As a result, we have imposed a higher standard under the state provision than the federal when the item seized is not one within the proviso of the third sentence of art 1, §11."

The proviso of the third sentence of Article 1, §11 of the Michigan Constitution prohibits application of the exclusionary rule to, among other things:

> "Any narcotic drug . . . seized by a peace officer outside the curtilage of any dwelling house . . ."

This case does not come within that proviso since marijuana is not a narcotic drug under Michigan law. MCLA 333.7107; MSA 14.15(7107).

It is true, but unremarkable, that the Michigan Supreme Court looked to federal case authority in its analysis of the state constitutional question. It does so traditionally. See *People* v *Secrest*, supra, at 525. However, unlike the situation presented to this Court in *Delaware* v *Prouse*, 44 US 648, 651-653 (1979), the state constitution has not been

interpreted as coextensive with the federal constitution. Examples of the greater protection afforded to citizens by the Michigan Constitution abound.

The Michigan Constitution prohibits warrantless participant monitoring of telephone conversations. *People* v *Beavers*, 393 Mich 554; 227 NW2d 511, cert den 423 US 878 (1975). Warrantless participant monitoring is permitted under the federal Constitution. *US* v *White*, 401 US 745 (1971).

The subjective test of entrapment is followed under the U.S. Constitution. *US* v *Russell*, 411 US 423 (1973). Michigan follows the objective test. *People* v *Turner*, 390 Mich 7, 19; 210 NW2d 336 (1973).

The Michigan Constitution's double jeopardy provision bars prosecutions by "dual sovereignties" for the same crime. *People* v *Cooper*, 398 Mich 450; 247 NW2d 866 (1976). Compare *Bartkus* v *Illinois*, 359 US 121 (1959).

The automatic standing rule of *Jones* v *US*, 362 US 257 (1960), repudiated in *US* v *Salvucci*, 448 US 83 (1980), has apparently not been abandoned in Michigan. See *People* v *Nabers*, 103 MichApp 354, 375; 303 NW2d 205, 214, rev'd on other grounds, 411 Mich 1046; 309 NW2d 187 (1981) and *People* v *Smith*, 118 MichApp 366, 373, 377; 325 NW2d 429 (1982).

In *People* v *Wallach*, 110 MichApp 37, 70-71 n.8; 318 NW2d 387 (1981), the Court said:

> "Michigan consitutional law in many ways provides more stringent standards to safeguard the rights of the individual accused than do our sister states and the federal system."

See also *People* v *Chernowas*, 111 MichApp 1, 4; 314 NW2d 505 (1981).

There is no reason to believe that the Michigan Supreme Court:

> "felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did." *Delaware* v *Prouse*, 440 US 648, 653 (1979).

At the very least, the question of the applicability of state law is uncertain enough that the Court should remand for clarification as to the ground upon which the judgment rested. Cf. *California* v *Krivda*, 409 US 33, 35 (1972).

CONCLUSION

No exigent circumstance justified the warrantless search of Long or his car. The only rationale advanced for these searches was the protective search rationale of *Terry* v *Ohio*, 392 US 1 (1968). The presence of an item in the car, not contraband, that could be used to hurt the officers did not justify a search of the car absent an objective basis for believing that the Defendant presented a danger to the officers. The officers' actions and testimony show they did not regard Long as a danger.

Further extension of *Terry's* exception to the warrant requirement is not justified as a matter of policy or on the facts of this case. The Michigan Supreme Court's decision should be affirmed.

Because the Michigan Supreme Court did not reach any other issue in the case, it presents an inappropriate vehicle for this Court's determination of any issue other than whether the scope of *Terry* should be expanded.

The Court lacks jurisdiction because the Michigan Supreme Court's decision was based on an adequate state ground. The Court should either remand for a clarification of the basis of the Michigan Supreme Court's decision or dismiss the Writ of Certiorari as improvidently granted.

Respectfully submitted,

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NO. 82-256

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

THE STATE OF MICHIGAN, PETITIONER

V.

DAVID KERK LONG, RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF OF AMICI CURIAE, GULF & GREAT PLAINS LEGAL FOUNDATION OF AMERICA, JOINED BY AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., IN SUPPORT OF PETITIONER STATE OF MICHIGAN

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INTEREST OF AMICI CURIAE

Gulf & Great Plains Legal Foundation of America ("GGP") is a nonprofit, tax-exempt corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational system of criminal justice, in which adjudications of guilt or innocence are reliable. GGP has appeared as amicus curiae in this honorable Supreme Court, in the federal courts of appeals, in federal district courts, and in various state courts, in cases involving criminal justice issues. In particular, GGP considers that the law of search and seizure has reached a point at which its unpredictability detracts seriously from

the performance of both the courts and the criminal justice system.[1]

Americans for Effective Law Enforcement, Inc. ("AELE"), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various state and federal Constitutions. AELE has previously appeared as amicus curiae forty-five times in the Supreme Court of the United States and thirty-three times in other courts, including the federal district courts, the federal courts of appeals, and various state courts, such as the supreme courts of California, Illinois, Ohio and Missouri.

Amici curiae will not attempt to duplicate the detailed case law analysis done by Petitioner, the State of Michigan, although we agree with that analysis and wish to express support for it. Further, amici curiae agree with, but will not repeat, Michigan's arguments supporting the legality of the inventory that discovered the larger quantity of contraband in the vehicle's trunk.

Instead, amici curiae appear primarily for the purpose of discussing the practical realities of traffic stops, which are a leading cause of officer fatalities. These concerns center upon that portion of the Michigan Supreme Court's holding that would apparently prevent an officer from conducting even the briefest

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1 GGP functions nationwide, although its office and efforts are concentrated in the States of the Gulf Coast and Great Plains regions. All litigation undertaken by GGP is approved by its Board of Directors, who are attorneys and businessmen and women residing throughout the Midwestern area. GGP does not accept private fees, but is funded by public contributions.

sort of frisk[2] of a vehicle's interior once its occupants have exited. If followed, this reasoning would lead either to increased officer fatalities or to substitution of other police practices that are more intrusive than the frisk at issue. There is an urgent need for a practical, workable guide to permissible police conduct in this unstable area of the law.

STATEMENT OF THE CASE

Amici curiae adopt the statement of the case made by Petitioner, the State of Michigan.

SUMMARY OF ARGUMENT

I.

The Michigan Supreme Court concluded that the preferable procedure for an officer conducting a traffic stop was to physically maintain a blocking position with his body to prevent the detained person from re-entering the vehicle, rather than securing the scene initially to allow a peaceful episode. The Michigan court's approach ignores such practical factors as traffic conditions, distractions, field investigatory needs, the presence of other persons, the existence of reasons for allowing the suspect to re-enter the vehicle, and the myriad other conditions comprising the "protean variety of the street encounter," Terry v. Ohio, 392 U.S. 1, 15 (1968), which will often make body position an unworkable means of ensuring safety throughout the duration of a traffic stop.

The Michigan court's approach also prevents the regular, systematic and repeatable procedures that are the essence of

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2 We have applied the term "frisk" to this action because it was brief, superficial, nonintrusive, and limited in purpose to discovery of weapons. Although a "frisk" has traditionally been thought of as a superficial search of a person, we respectfully submit that there is no reason that similar superficial searches of vehicle interiors should not be described similarly. Indeed, as is argued in Part II of this brief, below, the superficial search or frisk of a vehicle is less intrusive of privacy interests than a search of a person.

police professionalism. Police training emphasizes the unpredictability of persons subjected to detention. The officer who ignores nonintrusive standard safety procedures increases the danger of a violent encounter that may injure not only him, but the suspect or a bystander as well.

II.

The Michigan court's conclusion that Terry v. Ohio allowed only frisks of persons, and not frisks of places, puts fourth amendment values exactly backward. The fourth amendment protects people, not places. The brief frisk of the armrest in this case was less intrusive than the body frisk approved in Terry and carried with it none of the dangers of abuse recognized in that decision.

III.

The disallowance of intermediate means for securing safety would force officers to take the kind of "all or nothing approach" disapproved in Terry v. Ohio. Officers would be forced in discretionary situations to conduct full scale arrests that would otherwise be unnecessary because of the unavailability of less intrusive measures such as the armrest frisk at issue in this case.

ARGUMENT AND AUTHORITIES

I. THE MICHIGAN SUPREME COURT'S DECISION INVALIDATES A REASONABLE PROCEDURE NECESSARY TO PREVENT OFFICER FATALITIES.

As this Court has recognized, traffic stops result in a high percentage of officer fatalities. See, e.g., Adams. v. Williams, 407 U.S. 143, 148 n. 3 (1972) (citing study showing that approximately 30 per cent of police shootings occurred when a police officer approached an automobile); accord, Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977); Bristow, Police Officer Shootings–A Tactical Evaluation, 54 J.Crim.L.C. & P.S. 93

(1963).

The Court has "expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations," Pennsylvania v. Mimms, supra, at 110, and has recognized "that a significant percentage of murders of police officers occurs when the officers are making traffic stops." United States v. Robinson, 414 U.S. 218, 234 n. 5 (1973).[3] These considerations should be a part of the basis for evaluating the armrest frisk in this case.

A. The Michigan Court's analysis of risk to officers in such situations as this was unrealistic and impractical.

The Michigan Supreme Court concluded that because Respondent Long was outside the vehicle with an officer between him and the door at the time of the vehicular frisk, the frisk could not be justified by safety considerations. This view was unrealistically narrow.

First, the Michigan Court assumed that the preferable procedure was for Deputy Lewis to maintain a constant physical body-block posture between Long and the car door. This assumption would require the officer to jockey for position throughout the entire investigation. Instead, it is preferable for the officer to secure the safety of the scene so that he can peacefully concentrate on the investigation. See, e.g., Adams v. Williams, supra, 407 U.S. at 146; Cf. R. Adams, T. McTernan & C. Remsberg, supra note 1, at 69. The Michigan court's holding in this case would mean that the slightest distraction could allow the driver to lunge for the vehicle door and any weapon inside. Cf. Id. at 86.

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3 Cf. R. Adams, T. McTernan & C. Remsberg, Street Survival: Tactics for Armed Encounters 26 (1980) (police training manual for dealing with potentially armed persons). In addition to the danger posed by "routine" traffic stops, a large percentage of officer fatalities occurs during other encounters not involving arrest; approximately 19% occur during disturbance calls and 8% during "investigations of suspicious persons or circumstances." Id. at 25.

Furthermore, the Michigan court's approach ignores the possibility that circumstances may prevent the officer from even attempting to maintain constant interposition with his own body. For example, the stop may occur on a narrow urban freeway leaving little safe shoulder space. Alternatively, the officer may desire to conduct field testing for intoxication by having the suspect walk (a procedure that might have been called for in this case). An infinite number of other circumstances may similarly prevent the constant body-block approach preferred by the Michigan Court. As Chief Justice Warren said in Terry v. Ohio, 392 U.S. 1, 15 (1962), "No judicial opinion can comprehend the protean variety of the street encounter."

In addition, there are frequently practical reasons for allowing the driver to re-enter the vehicle. If (as happened in this case) his license or registration remain in the car, the most practical course may be for the driver to obtain them. Failure to conduct the armrest frisk under the circumstances of this case would then be both dangerous and unprofessional.[4] It may also be necessary for an officer to return to his own vehicle to obtain a clipboard or a flashlight, and he then could not remain between the driver and the car door. Still another possibility, noted by the Michigan Chief Justice in dissent, was that the officers might have permitted Respondent Long to drive away, in which event he would have ready access to whatever weapons might be secreted anywhere in the vehicle. Given Respondent Long's drug-influenced and erratic bahavior, it was particularly proper for the officers to

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4 The alternative, and perhaps the more typical and better approach, is for officers in this situation to search for and retrieve the license and registration themselves. This search would require greater intrusion than the minimal frisk in question here, and would moot the issue. The point, however, is that an officer should not be constitutionally prohibited from using the less intrusive approach of a brief, superficial weapons search followed by allowing the driver to obtain his papers if that is the more practical alternative. The point, further, is that since Long's papers were apparently in the vehicle, some intrusion was necessary here in either event.

consider the danger he posed to them upon release. [5]

Finally, the Michigan Court's analysis fails to take account of such possibilities as a stop taking place in the vicinity of a hostile crowd, or even of such commonplace variations as the presence of passengers in the vehicle. Thus, for example, in New York v. Belton, 101 S.Ct. 2860 (1981), the automobile had four occupants, and the single arresting officer "split them up into four separate areas of the Thruway . . . so they would not be in physical touching area of each other." This Court nevertheless upheld, as incident to arrest, a search of the passenger compartment Belton had recently occupied.[6] The Court concluded that "articles inside the relatively narrow compass of the passenger compartment of an automobile" are "generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item' " even when he is outside the car and situated at a different corner of the intersection. 101 S.Ct. at 2864 (emphasis added). Although different from the present case in that it involved a search incident to arrest rather than the brief frisk at issue here, Belton exemplifies the sort of realistic and workable approach that should be adopted here.

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5 In addition, the Michigan Court failed to take account of the substantial likelihood that officers may have further contact with a driver such as Long even after they release him. When a subject exhibits erratic behavior, particularly owing to drugs or alcohol, a second or third encounter on the same evening is not unlikely. For example, Terry v. Ohio, supra, 392 U.S. at 14 and n. 9, recognizes that an officer may choose not to arrest a marginally alcohol-influenced driver. The officers considered such an approach here. In that event, if the driver happens to be armed, a second encounter presents extremely high risk to the officers.

6 This court stated, "While the Chimel case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant." 101 S.Ct. at 2864. The Court established such a "workable rule" by allowing the intrusion in the entire "category of cases" involving vehicular arrests.

B. The brief vehicular frisk undertaken here was a proper response to danger signals that would have been perceived by any professional officer.

Before Officer Howell conducted the armrest frisk in this case, he knew a number of facts that would have alerted any well-trained officer to possible danger.[7] Under these circumstances, it would have been unprofessional and a failure of duty not to have conducted the frisk undertaken here.

Police training manuals emphasize that every situation and every suspect must be regarded as unpredictable.[8] *"Never underestimate a suspect . . .* [Y]ou will come into contact with a great variety of people under many different circumstances . . . remember, you are not a mind-reader. You have no way of telling what the subject may be thinking." G. Sylvan, Defense and Control Tactics 70 (1971) (emphasis in original). "It is impossible to predetermine a person's reaction to police restraint." E. Williams,

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7 Respondent Long had driven at 71 miles per hour and had parked partially in a ditch. Long was "under the influence of something." Officer Howell also knew that, on two occasions, Long had refused to comply with reasonable requests that he produce his license and that he furnish his registration and proof of insurance. He had observed Long attempt to re-enter the open car door, and he knew that, had Long reached the car door, he would have had access to a 4-inch knife that could readily be used to kill either officer. Finally, before frisking the vehicle, Officer Howell knew that there was "something leather" under the armrest, and he knew that this item could have been or contained a weapon. This observation was made while the officer was still outside the car, using only his flashlight as an aid.

The observation of "something leather" fell within the plain view doctrine. To this point, the officer's actions had not become a search, or even a frisk. Thus the armrest frisk should be evaluated under all the facts–including Long's erratic behavior, his apparent intoxication, his attempt to re-enter the car, the long-bladed knife, and the observation of something leather.

8 See also, e.g., Washington v. Chrisman, 102 S.Ct. 812 (1982) (recognizing that every arrest must be conducted with the realization that the suspect's actions are unpredictable).

Modern Law Enforcement and Police Science 199 (1967). Publications of the American Bar Association also agree with this concept:

> Most persons stopped for interrogation do not constitute any threat to the safety of the interrogating officer. This is true even though they may be guilty of some offense. But recognizing that most persons interrogated are harmless only emphasizes the fact that some are not. Officers are sometimes attacked . . . . In addition, *there is no way officers can identify in advance which suspects are likely to be dangerous.*
>
> *The officer's lack of ability to predict reliably whether a particular suspect is armed and dangerous, combined with the high degree of danger to him if he makes a wrong guess,* results in the officer's feeling that he must constantly be on guard.

Tiffany, Police Action Taken for Self-Protection, in American Bar Foundation, Detection of Crime 44-45 (1967) (emphasis added). This work recognizes, as the Michigan Supreme Court did not, that an officer meets hundreds or thousands of unpredictable people in a career, and yet he cannot afford to underestimate even one. This American Bar Association publication also indicates that the "frisk" is a common means of police response to such unpredictability.[9]

A familiar situation is presented in the "hundreds of cases where policemen lost their lives simply because they allowed [a suspect] to go into the bedroom to get his coat prior to going to the station, or to go to the bathroom, or to get a drink of water, *lock his automobile or any one of a number of last minute chores. In each case, the [suspect] returned*

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9 See also R. Adams, T. McTernan & C. Remsberg, supra note 1, at 77; R. Clift, A Guide to Modern Police Thinking 186-87, 192 (3d ed. 1970).

with a weapon and killed the officer." R. Clift, supra at 192 (emphasis added).[10] Every experienced officer recognizes the danger presented by the precise fact situation in the case at bar. For example, Houston Police Academy Instructor J. W. Conley reports that on one occasion, while in the patrol division, he encountered a driver who offered to "go back to the car to get my license." Officer Conley refused the offer, went and looked himself, and found a fully loaded and cocked .45 calibre weapon in the seat, precisely where petitioner Long's armrest was located in the present case. Interview with J. W. Conley, Houston Police Academy Instructor, by David Crump, in Houston, November 9, 1982.

The Michigan Court's analysis would prevent officers from using consistent, systematic procedures to minimize the effects of this unpredictability. In contrast, police training, as well as the decisions of this court, emphasize the desirability of officers "following the same procedures" in all similar cases.[11] R. Adams, T. McTernan & C. Remsberg, supra noted, at 94. Thus "vehicle approaches should be viewed [similarly] *regardless* of the motorist involved. Repetition . . . forms good . . . habits." Id. at 77

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10 In one such incident that is given as an example in a police training book, the officer told the husband in a domestic disturbance to "go get your shoes and shirt on. You're going to jail." Without a word, the husband went into the bedroom, returned with a rifle, and shot and killed the officer, his wife and himself. P. Brooks, Officer Down: Code Three 136 (1975). This same scenario was repeated on September 19, 1977, when officer David Huerta of the Houston Police Department used a suspect's telephone to report his location and was killed by the suspect, who obtained a shotgun from the bedroom, where the officer had allowed him to go unattended. Interview with Assistant Chief John Bales, Houston Police Department, by Susan Crump, in Houston, July 27, 1981.

11 The training manuals also emphasize the importance of avoiding "overconfidence" and they caution against the belief that the officer "can face down any danger that threatens [as] a matter of will and bravado." Such an attitude is dangerous not only to the officer, but to others with whom he may come into contact. Unprofessional approaches are likely to result in injuries to bystanders or to the sub-

(emphasis in original). The essence of professionalism is the use of careful, systematic processes. For these reasons, this court has emphasized the need to "establish [a] workable rule [in] this category of cases [i.e., cases involving automobile interiors when a suspect has been removed from them]." New York v. Belton, supra, 101 S.Ct. at 2864. As one commentator has written,

> A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."

LaFave, Case by Case Adjudication Versus Standardized Procedures: The Robinson Dilemma, 1974 Sup.Ct.Rev. 127, 142, cited in New York v. Belton, supra, 101 S.Ct. at 2863.

II. THE VEHICULAR FRISK HERE WAS LESS INTRUSIVE THAN OTHER PROCEDURES APPROVED BY THIS COURT FOR OFFICER SAFETY.

A. In insisting that Terry only covered searches of persons, the Michigan Court reversed the proper priorities, because the fourth amendment "protects people, not places," and the vehicular frisk at issue was actually less intrusive than a frisk of a person.

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ject of the investigation, as well as to the officer.

Hence the manuals warn police trainees against what they call the "Superman syndrome," in which officers influenced by the heroes of television police programs or Western movies fail to undertake sensible self-protection procedures and thereby precipitate violent encounters that could be avoided. See R. Adams, T. McTernan & C. Remsberg, supra note 1, at 40. The Michigan Court's opinion, if affirmed by this Court, will inadvertently contribute to this syndrome.

The Michigan court's most anomalous conclusion was that the rationale of Terry did not apply because "Terry authorized only a limited pat-down search of a *person* suspected of criminal activity. That case did not authorize the search of an area." 413 Mich. at _____, 320 N.W.2d at 869 (emphasis in original).

This reasoning is precisely opposite traditional fourth amendment values. It exhalts places over persons. But this Court has held that the fourth amendment "protects people, not places." United States v. Katz, 389 U.S. 347, 351 (1967). Rather than preferring a pat-down of the individual's body, the Michigan Court should have preferred the less intrusive frisk of the vehicle.[12]

Indeed, Terry itself shows that the vehicular frisk should be considered less intrusive. In Terry, the Chief Justice emphasized the "severe . . . intrusion upon cherished personal security" represented by a personal frisk, even though the Court upheld the frisk at issue there. "Even a limited search of the outer clothing for weapons . . . must surely be an annoying, frightening, and perhaps humiliating experience." 392 U.S. at 24-25. The Court fully recognized the bodily invasion it was approving by quoting from a police training manual, as follows:

> Consider the following apt description: "[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and the entire surface of the legs down to the feet."

Id. at 17 n. 13. The Chief Justice even considered that some

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12 Thus, for example, while a person may have a privacy interest in an inanimate object, invasion of that interest may be justified when similar invasion of the person would not be. Cf. United States v. Place, 660 F.2d 44 (1st Cir. 1982), cert. granted (51 U.S.L.W. 3023, Aug. 3, 1982), and authorities therein cited.

such bodily contact might be intentionally misused, as a part of "agressive patrol" or even "wholesale harrassment" designed "to maintain the power image of the beat officer." Id. at 14-15 & n. 11. Thus, concludes the Terry opinion, the bodily frisk "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." Id. at 17.

The vehicular frisk at issue here is strikingly less intrusive; it presents virtually none of these disadvantages. The raising of an armrest in a car is simply not "an annoying, frightening, and . . . humiliating experience." It is not "a serious intrusion upon the sanctity of the person, which may inflict great indignity." Furthermore, the likelihood of its being used as a means of "wholesale harrassment" is small, and it cannot "maintain the power image of the beat officer." In fact, the intrusion involved in this armrest frisk was insignificant compared to the stop itself or the pat-down of Respondent's person.

B. The frisk was consistent with the rationale underlying Terry and with other decisions of this Court.

Terry depends upon "balancing the need to search [or seize] against the invasion which the search [or seizure] entails." Terry v. Ohio, supra, at 21. One element of this balance, the "nature and quality of the intrusion," id. at 24, is comparatively small in this case, for the reasons given above. The opposing interest is high.[13] Cf. Id. at 24.

More persuasively, the case of Peters v. New York, 392 U.S. 40, 66 (1968), decided simultaneously with Terry as a com-

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13 "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed [petitioner Long's possibly prohibited knife had already been discovered], . . . it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."

panion case to Sibron v. New York, constitutes a firm, if implied, rejection of the Michigan Court's reasoning that physical means such as body position remove the right to frisk. In Peters, the officer was actually holding the suspect at gunpoint when the pat-down occurred. A suspect disabled by a drawn weapon would appear as ostensibly harmless as a suspect standing at the rear of a vehicle with an officer between him and the car door, as in this case. However, the Peters court upheld the officer's frisk as appropriate because it enabled the officer to proceed to conduct a calm, deliberate investigation.[14] The same result should follow more clearly in the case of this less intrusive frisk.

III. IF THERE WERE NO MEANS FOR A BRIEF VEHICULAR FRISK IN CIRCUMSTANCES SUCH AS THIS, OFFICERS WOULD BE FORCED INTO AN ANOMALOUS "ALL OR NOTHING" APPROACH THAT WOULD LIKELY RESULT IN GREATER INFRINGEMENT OF PERSONAL PRIVACY.

In Terry, supra, 392 U.S. at 17, the Chief Justice warned against "A rigid all-or-nothing model of justification and regulation under the [Fourth] Amendment." Disallowance of intermediate responses, such as the frisk, might well force officers into the most severe patterns of behavior when less intrusive measures might suffice.

For example, officers might be induced to exercise their discretion to make a full-scale arrest that would otherwise be unnecessary. An immediate arrest of Petitioner Long might con-

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14 See also Pennsylvania v. Mimms, supra, 434 U.S. at 333 (the "important interest" in uniform practice of requiring occupants to exit vehicle outweighs "de minimis" intrusion); Adams v. Williams, supra (upholding officer's reaching into vehicle to retrieve invisible, but suspected, pistol found at drivers waist); cf. New York v. Belton, supra, 101 S.Ct. at 2864 (search incident to arrest; passenger compartment within "the area into which an arrestee might reach in order to grab a weapon or evidentiary item" even if he has exited vehicle).

ceivably have been justified here, in fact, under either the prohibited weapons statute or for driving under the influence. In many cases, the decision to arrest is a close judgment call. Thus the byproduct of the Michigan court's decision, if followed, would be the use of arrest as a substitute for the less intrusive frisk, in some situations in which that option is available.

Likewise, an officer's drawing of his gun before approaching a vehicle is an appropriate measure for some traffic stops in which drivers are suspected of serious felonies. This measure is perfectly lawful and could, indeed, be adopted in all cases, but it is generally not done because it is a serious invasion of the security of the detainee. But if the Michigan court's reasoning is followed, there will be more cases in which the reasonable officer will feel forced to investigate with his weapon ready because he is denied the intermediate alternative of a frisk.

In addition, a wide variety of other police behaviors might be inadvertently affected by the Michigan court's approach. Some police training manuals, for example, recommend that the officer "develop a 'no' complex" and "allow no privileges" to a detained suspect. E.g., R. Clift, supra, at 191-92; cf. Washington v. Chrisman, 102 S.Ct. 812 (1982) (recognizing that unduly restrictive reading of the fourth amendment would cause officers to disallow reasonable requests by detained persons).

CONCLUSION

The decision of the Michigan Supreme Court should be reversed. In its opinion, this Court should establish the "workable rule this category of cases requires," as it did in the similar case of New York v. Belton, 101 S.Ct. 2860 (1981), for vehicular searches incident to arrest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have, in accordance with Rules 28.2-28.3 of this Court, served three copies hereof upon each counsel of record herein for a separately represented party, by depositing such copies, postage prepaid, in a United States Post Office, addressed to: Louis Caruso, Attorney General's Office, 610 Law Bldg., 525 West Ottawa, Lansing, Michigan 48913, and Jim Geary, Little & Geary, 107 W. Michigan, Suite 301, Kalamazoo, Michigan 49007.

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No. 82-256

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE PEOPLE OF THE STATE OF MICHIGAN, PETITIONER

v.

DAVID KERK LONG

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a police officer who has lawfully stopped a car to question the driver, and who reasonably suspects that the car might contain a weapon and that the driver might be dangerous, may conduct a limited search of the car for the weapon even if the driver is standing outside the car.

2. Whether a search of the unlocked trunk of a car about to be towed can be justified as a routine inventory.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-256

THE PEOPLE OF THE STATE OF MICHIGAN, PETITIONER

v.

DAVID KERK LONG

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents an important question concerning the power of a law enforcement officer to protect himself when he stops an automobile on reasonable suspicion. Various federal law enforcement authorities routinely make such stops for investigative purposes, and the resolution of this issue will determine the extent to which such officers may protect their safety by conducting a limited weapons search of the inside of the automobile. This case also presents a question concerning searches made for the purpose of taking an inventory of a vehicle that is, or is about to be, impounded by the authorities.

Federal law enforcement agencies have inventory practices that share some of the characteristics of the inventory search at issue in this case.

STATEMENT

1. Shortly after midnight on the morning of August 25, 1977, Deputies Howell and Lewis of the Barry County, Michigan, sheriff's department saw an automobile speed past them in the opposite direction; their radar showed the car to be going 71 miles per hour. Pet. App. 14, 36; H. Tr. 4.[1] The deputies turned around and pursued the car briefly. They then saw it swerve and come to rest with its front wheels in a shallow ditch beside the road. The back of the car was on the roadway. Pet. App. 14.

Respondent was the driver and only occupant of the car. When the deputies' vehicle parked behind his, respondent stepped from the car, leaving the driver's side door open, and met the deputies near the rear of his car. Deputy Howell asked respondent for his driver's license; respondent gave no answer. The deputy asked again, and respondent produced his license. Deputy Howell then asked respondent for his vehicle registration; again respondent made no response. When the deputy repeated his request, respondent, without saying anything, began walking toward the open door of his car. Pet. App. 14-15; H. Tr. 26. By this time, Deputy Howell had concluded that respondent "appeared to be under the influence of something" (Pet. App. 15; H. Tr. 20, 24).[2]

The deputies followed respondent back toward the car. As they approached the open door, Deputy Howell saw a large folding hunting knife with a four-inch blade lying closed on the floor in front of the driver's seat. Deputy

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[1] "H. Tr." refers to the transcript of the preliminary examination held on September 22, 1977. "Op. Tr." refers to the pretrial proceedings, held on April 28, 1978, which include the trial judge's oral opinion denying respondent's suppression motion.

[2] The deputy had previously noted that respondent drove erratically. H. Tr. 18.

Howell immediately told respondent to halt and to place his hands on the roof of the car; he then patted down respondent's clothing to see if he was carrying any weapons (Pet. App. 15 & n.1; H. Tr. 6). Deputy Lewis picked up the knife (Pet. App. 15; H. Tr. 48).

Deputy Howell then shone his flashlight into the front seat of respondent's car. Pet. App. 15. He explained that he was "looking * * * [t]o see if there was another weapon in the car" (H. Tr. 6-27; see Pet. App. 36). Deputy Howell saw, in the flashlight beam, a leather object protruding from under the fold-down armrest that separated the driver's side of the front seat from the passenger's side. Pet. App. 15; H. Tr. 22-23. Because Deputy Howell could not tell what this object was (H. Tr. 37), he knelt in the car and lifted the armrest. He then saw that the object was a leather pouch with a plastic bag protruding from it. Through the portion of the plastic bag that was protruding Deputy Howell saw a substance that he recognized as marijuana. Pet. App. 15, 37; H. Tr. 7, 37. Deputy Howell did not remove the pouch from the front seat until he had seen the marijuana in it. H. Tr. 30.

While these events occurred, respondent was standing near the rear of the car, two or three feet from the open door, with Deputy Lewis. Pet. App. 15; H. Tr. 27. Respondent was not handcuffed, and Deputy Lewis had not drawn his gun. H. Tr. 25, 28.[3]

2. When Deputy Howell saw the marijuana, he seized the pouch and placed respondent under arrest for possession of marijuana. He determined that respondent's car would have to be towed because respondent was under arrest, there was no other driver, and the car was partially blocking the road. After searching the inside of the car—a search that did not uncover the registration—Deputy Howell walked to the rear of respondent's car and noticed, for the first time, that the trunk lock had

[3] Deputy Howell testified that respondent "is probably a foot taller than" Deputy Lewis. H. Tr. 28.

been "punched out" (Pet. App. 15-16). He reached into the opening with a pocket knife and opened the trunk. Deputy Howell explained his reasons for doing so (H. Tr. 10-11):

> It was unusual circumstances to me. Also we check the vehicle to make sure there's nothing, you know, that's valuable.
>
> * * * * *
>
> I can't speak for the other officers, myself I check the vehicle to make sure there's nothing of value in there that can be later claimed—
>
> * * * * *
>
> [I opened the trunk n]umber one, because I already found [the] marijuana, suspected marijuana in the interior of the car, there may have been more in the trunk. Secondly I check them for valuables.

In the trunk Deputy Howell found two large paper bags that contained approximately 75 pounds of marijuana. Pet. App. 16.

3. The Barry County Circuit Court denied respondent's motion to suppress the marijuana. The judge explained his determination that the marijuana found on the front seat of the car was admissible as follows (Op. Tr. 5):

> I'm satisfied the officers were justified in searching the automobile for their protection. They observed this large knife and * * * they believed the defendant was under the influence of something from his actions. As I remember, he refused to say anything. * * *
>
> I'm satisfied that * * * the condition of the defendant, * * * his movement towards the automobile, and the view of the large knife, caused the officers to be apprehensive for their own safety, and therefore, they could make a search for weapons within the immediate surroundings of the defendant.
>
> I'm satisfied that this leather pouch could have contained a weapon * * *.

The judge also found that Deputy Howell opened the trunk because he was "concerned about valuables" (Op. Tr. 6). He upheld the search of the trunk as a lawful inventory search (*ibid.*).

A Circuit Court jury convicted respondent of possession of marijuana, in violation of Mich. Comp. Laws § 335.341(4)(d). He was sentenced to two years' probation, a $750 fine, and $300 in court costs. Pet. App. 35.

4. The Michigan Court of Appeals affirmed respondent's conviction. It held first that under *Terry* v. *Ohio*, 392 U.S. 1 (1968), "Deputy Howell's precautionary lifting of the frontseat armrest prior to allowing [respondent] to reenter his automobile was constitutionally valid as a protective search" (Pet. App. 39). The court found that Deputy Howell's inspection of the front seat was a "carefully circumscribed intrusion" and that there was "no evidence of a fullscale search of the automobile's interior" before respondent was arrested (*id.* at 40). The court noted that respondent had behaved erratically and was about to reenter the car when Deputy Howell saw the knife, and it ruled that the deputies were not "constitutionally required to allow [respondent] access to the driver's seat of his automobile without first taking the protective precaution of * * * ensur[ing] that no weapon was readily available there to [respondent's] grasp" (*ibid.*).

The Michigan Court of Appeals also held that Detective Howell's search of the trunk of respondents' car was a valid inventory search under *South Dakota* v. *Opperman*, 428 U.S. 364 (1976) (Pet. App. 42-44). The court of appeals stated that the decision to impound the vehicle was "clearly reasonable" in view of respondent's arrest and the car's location and vulnerability to theft (*id.* at 42). The court also found it immaterial that the search was conducted at the scene (*id.* at 42-43). The court noted the trial judge's finding that Deputy Howell's decision to search the car was prompted at least in part by his intention to take an inventory of valuables, and ruled

that Deputy Howell's reliance on an additional, "concurrent," and arguably valid basis for the search—that he could permissibly search for additional evidence once respondent had been arrested for possession of marijuana—did not undermine the inventory search rationale (*id.* at 43-44).

5. The Michigan Supreme Court, by a divided vote, reversed respondent's conviction. The majority did not question Deputy Howell's pat-down of respondent's person, but it held that *Terry* v. *Ohio*, *supra*, "authorized only a limited pat-down search of a *person* suspected of criminal activity. That case did not authorize the search of an area" (Pet. App. 18; emphasis in original; footnote omitted). The court added that "[a]ny weapon which might have been hidden in the car would have been out of the reach of [respondent] and thus not a danger to the deputies. Therefore, the sole justification of the *Terry* search, protection of the police officers and others nearby, cannot justify the search in this case" (*id.* at 18-19; footnote omitted). The court then held that the marijuana found in the trunk was the fruit of the search of the front seat because the state sought to justify the search of the trunk either as an inventory search or as a search incident to arrest, and, the court ruled, both justifications rested on the discovery of marijuana on the front seat (*id.* at 19-20).

Chief Justice Coleman dissented. She first rejected the majority's holding that *Terry* permitted only the search of a person, not the search of an area. She noted that in *Terry* itself the suspect wore an overcoat that the officer patted down, but that "a different result would not have been constitutionally required if the overcoat had been carried, folded over the forearm, rather than worn" (Pet. App. 23).

Chief Justice Coleman also disagreed with the majority's conclusion that the protective search of the front seat was unjustified because respondent was unable to reach any weapons in the car at the time. She noted that

had respondent not been arrested, he would have been allowed to reenter the car; in addition, she observed, respondent might have broken away and attempted to reenter the car while the deputies were still questioning him. In either event, respondent's "entry into the vehicle would have permitted him to gain possession of any readily accessible weapons in the vehicle" (Pet. App. 24).

Chief Justice Coleman also concluded that Deputy Howell's inspection of the front seat was not excessive in scope. She reasoned that the circumstances surrounding respondent's encounter with the deputies, including his erratic behavior and the knife on the floor of the car, gave them ample reason to shine a light into the car to see if other weapons were accessible. When Deputy Howell did so, he saw the leather pouch; and "[c]onsidering all the circumstances, including that one weapon had already been found and that the leather pouch was large enough to hold another, the officer could have reasonably concluded that safety required * * * [t]he lifting of the armrest" (Pet. App. 25). Moreover, she remarked, "[i]n contrast to the gravity of the dangers confronting the officers, the raising of the armrest was a minimal intrusion into [respondent's] legitimate expectation of privacy. The area underneath an armrest is not a * * * common repository for personal effects" (*id.* at 26). The marijuana, she noted, was in plain view once Deputy Howell lifted the armrest (*ibid.*). Chief Justice Coleman also concluded that the search of the trunk was lawful (*id.* at 27).

Justice Moody agreed with Chief Justice Coleman's analysis of the inspection of the front seat. He reasoned that the discovery of the knife justified the deputies' decision not only to ensure that respondent had no weapons on his person but "to conduct a brief search of the interior of the automobile for weapons, limited to areas in which a weapon could be concealed, yet accessible" (Pet. App. 28). The reason for the search, Justice Moody stated, was that "the officers might be endangered if [respondent] was permitted to re-enter the vehicle to gather

requested information or to drive away at a later point" (*ibid.*). Justice Moody further concluded that Deputy Howell's inspection of the front seat "was confined in scope reasonably designed to discover additional hidden instruments for potential assault upon the police officers" (*ibid.*).

Nevertheless, Justice Moody agreed with the majority that respondent's conviction should be reversed, concluding that the search of the trunk was illegal. He noted in particular that in this case, unlike *South Dakota* v. *Opperman*, *supra*, there was no standard inventory policy applied by the police department (Pet. App. 32).

SUMMARY OF ARGUMENT

I

Terry v. *Ohio*, 392 U.S. 1 (1968), held that a police officer who has lawfully stopped a suspect, and who believes that the suspect may be armed and dangerous, may protect himself by conducting a limited search of the suspect's person for weapons. Deputy Howell's limited inspection of the front seat of respondent's car was consistent with the principles of *Terry* and the reasonableness standard of the Fourth Amendment.

A. It is undisputed that Deputies Howell and Lewis had ample reason for the initial stop of respondent. Their subsequent observation of a large hunting knife in an easily accessible location, and of respondent's erratic behavior, gave them reason to believe that respondent might be armed and dangerous. The Michigan Supreme Court appeared to recognize as much, for it did not question the deputies' decision to frisk respondent's person. But the court held that Deputy Howell violated the Fourth Amendment when he inspected the front seat of respondent's car for weapons.

B. Deputy Howell's inspection of the front seat was limited in two important respects. First, he inspected areas—the front seat, and the area beneath the armrest only when he saw a suspicious object there—in which re-

spondent had, at most, a minimal expectation of privacy. Second, Deputy Howell's inspection extended only to areas where a weapon might have been placed—where, in fact, respondent would very likely have placed a weapon if he wished it to be accessible or if he had concealed it hastily when the officers approached.

The Michigan Supreme Court nonetheless invalidated Deputy Howell's inspection for two reasons. It first asserted that *Terry* applies only to searches of a suspect's person and does not permit an area near a suspect to be inspected for weapons. This assertion is plainly incorrect. The purpose of a limited *Terry* search is to enable an officer to protect himself from the risk of physical harm, and a suspect can endanger an officer by obtaining a weapon from a nearby area just as he can by using a weapon concealed on his person.

Second, the Michigan Supreme Court disapproved Deputy Howell's inspection of the front seat because, it asserted, respondent was "under control," and any weapon in the car was therefore out of his reach and not a danger to the deputies. This conclusion is probably incorrect as a matter of fact. But the Michigan Supreme Court's more fundamental errors lay in its attempt to reassess the danger faced by the deputies in the particular situation, and in its suggestion that they should have found some other way of protecting themselves, such as placing respondent under more complete control.

In our view, the correct approach is to apply a relatively simple and clear rule analogous to that established in *New York* v. *Belton*, 453 U.S. 454 (1981). *Belton* held that police officers may search a car incident to arrest even when the arrestees have been removed from the car. Similarly, officers should be allowed to conduct a limited *Terry* search for weapons in a car when they suspect that the person they have stopped might be armed and dangerous; courts should not speculate, after the fact, about the alternative measures the officer might have taken to prevent the suspect from gaining access to the car.

The reasoning that supported the adoption of such a rule in *Belton* applies at least as strongly in this case. First, when the police have reasonable suspicion, and therefore may stop a suspect, but do not have probable cause to arrest him, it is unclear to what extent they may use various methods of controlling him—such as handcuffing him, drawing a weapon, or placing him in a police vehicle. Officers making an investigatory stop may hesitate to take measures lawfully available to them because they do not want inadvertently to place a suspect under arrest. Moreover, an officer making an investigatory stop may be face-to-face with a suspect for an extended time —and therefore highly vulnerable to an assault—while he questions the suspect to determine whether to release him or arrest him.

Second, a limited weapons search of a car is far less of an intrusion than the search incident to arrest authorized by *Belton*.

Third, a brief inspection for weapons, unlike a search incident to arrest, is often the only practical alternative to substantially more intrusive action. An officer who reasonably believes himself endangered, but who cannot conduct a limited search for weapons, will have to restrict the personal mobility of the suspect in ways that most people would find far more intrusive than a limited inspection of a car. Moreover, if an officer has probable cause, the inability adequately to protect his safety during an investigative stop will prompt him to make a full arrest when he might otherwise simply have stopped a suspect for further investigation.

Finally, a stop, unlike an arrest, may culminate in a suspect's being allowed to return to his car; if he does, the suspect will have immediate access to any weapon in the car. Of course, if at the end of a stop the suspect, instead of being returned to his car, is arrested, *Belton* permits a full search of the car. Whatever the outcome of the investigative stop, it is therefore reasonable for the offi-

cers to take the relatively modest self-protective measures at issue here whenever they are confronting a potentially dangerous individual.

II

Although we believe the search of the trunk of respondent's car can be justified as a search incident to arrest, the State apparently defends it solely on the ground that it was undertaken in order to inventory the contents before impounding the car. See *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). The majority of the Michigan Supreme Court did not consider either the inventory search or search incident to arrest justification, because it believed that both rested on Deputy Howell's discovery of marijuana on the front seat. If this Court rules that Deputy Howell's inspection of the front seat was lawful, it may wish to permit the Michigan Supreme Court to consider, in the first instance, the possible justifications for the search of the trunk.

If the Court does address the legality of the search of of the trunk, however, we offer certain observations. While Deputy Howell's search, unlike the search upheld in *Opperman*, was apparently not conducted pursuant to a regular departmental inventory procedure—thus significantly weakening the inventory search rationale—the other differences between this search and the search upheld in *Opperman* strengthen the inventory search justification here. First, the police in *Opperman* searched the locked passenger compartment of a car, including an unlocked glove compartment, while Deputy Howell searched an unlocked trunk—a place in which the owner of a car has less of an expectation of privacy, and which is far more accessible to thieves and more likely to give rise to claims against the police department. Second, Deputy Howell searched respondent's car on the scene, instead of waiting, as the police did in *Opperman*, until it was impounded; such a search on the scene is no more intrusive and is in fact likely to be far more effective in forestalling claims of theft.

ARGUMENT

I. A POLICE OFFICER WHO HAS LAWFULLY STOPPED A CAR AND REASONABLY SUSPECTS THAT THE OCCUPANT MIGHT BE ARMED AND DANGEROUS MAY CONDUCT A LIMITED INSPECTION OF THE CAR FOR WEAPONS EVEN IF THE SUSPECT IS NO LONGER SEATED IN IT

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court held that when a police officer has lawfully stopped a suspect, the Constitution "permit[s] a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Id.* at 27. The Court explained that in such circumstances, it would be "clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." *Id.* at 24. See also *Adams* v. *Williams*, 407 U.S. 143, 146 (1972). The principal issue in this case is whether Deputy Howell's inspection of the front seat of respondent's car is valid under the principles of *Terry*.

A. There is no question that Deputy Howell and Deputy Lewis had sufficient reason to stop respondent; he was speeding and he had driven off the road. Initially, the officers merely asked respondent routine questions; having received no indication that respondent was armed or dangerous, they did not search either him or his car. Cf. *Government of Canal Zone* v. *Bender*, 573 F.2d 1329 (5th Cir. 1978) (search of automobile for weapons held illegal when stop was made on suspicion of nonviolent crime and officers had seen no weapons).

But when respondent began to return to the car, the officers saw a large knife on the floor in front of the driver's seat. None of the courts below questioned the fact, testified to by the officers, that this knife was in plain view. The officers also had observed that respondent was acting erratically, as if he were under the influence of al-

cohol or a drug. These circumstances plainly could have led the deputies "reasonably to conclude in light of [their] experience * * * that the person[] with whom [they were] dealing may be armed and presently dangerous" (*Terry* v. *Ohio*, *supra*, 392 U.S. at 30). In *Pennsylvania* v. *Mimms*, 434 U.S. 106, 111-112 (1977), the Court held that a bulge under the clothing of a person stopped for a traffic violation creates a reasonable suspicion that the person is armed and dangerous and justifies a frisk of his person. The discovery of an actual weapon is an even clearer indication of dangerousness than a suspicious bulge. See also *State* v. *Luxem*, 324 N.W.2d 273 (S.D. 1982). It was surely reasonable for the deputies to conclude that a person who kept one knife readily accessible might also keep another knife or other weapon within easy reach, and respondent's behavior gave them ample reason to fear for their safety if respondent should gain possession of a deadly weapon.

The Michigan Supreme Court apparently acknowledged that the deputies had reason to fear for their safety, because it did not question that Deputy Howell was justified in frisking respondent's person for weapons. Pet. App. 18 n.6. But the court held that Deputy Howell was not justified in shining his light into the front seat, and then lifting the armrest when he saw a leather object capable of holding a weapon protruding from beneath it.

B. 1. Two aspects of Deputy Howell's search should be noted at the outset. First, that search constituted only a minimal invasion of respondent's privacy. It is by now well settled that an individual has a diminished expectation of privacy in the interior of an automobile. See, *e.g.*, *United States* v. *Ross*, No. 80-2209 (June 1, 1982); *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979); *Chambers* v. *Maroney*, 399 U.S. 42, 48-57 (1970). While a full-scale search of an automobile must ordinarily be supported by probable cause, this diminished privacy consideration is nevertheless relevant in determining the reasonableness of the relatively cursory "car frisk" under-

taken here. Deputy Howell did not rip open the seats of respondent's car (see *Carroll* v. *United States*, 267 U.S. 132 (1925)); he did not even open any container until he had ascertained that the transparent plastic bag held contraband (see *United States* v. *Ross*, *supra*). By shining his light on the front seat of the car, Deputy Howell saw nothing that a passer-by might not have seen in daylight or if respondent had stopped near a light at night. Deputy Howell did not lift the armrest until he saw a suspicious object underneath it, and in any event, as Chief Justice Coleman noted, the area beneath an armrest is not a place customarily used for private objects.

Terry emphasized that "the central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security" (392 U.S. at 19) and that "there is 'no ready test for determining reasonableness other than by balancing the need to search * * * against the invasion which the search * * * entails'" (*id.* at 21, quoting *Camara* v. *Municipal Court*, 387 U.S. 523, 536-537 (1967)). As noted above, the Michigan Supreme Court apparently acknowledged that the deputies had a sufficient reasonable apprehension of danger to frisk respondent's person, an action that this Court has described as "a serious intrusion upon the sanctity of the person, which may inflict great indignity" (*Terry*, 392 U.S. at 17). If it was reasonable for the officers to frisk respondent's person, it is difficult to see how Deputy Howell's limited inspection of the car could have been unreasonable. While weapons in the car would have been less accessible to respondent than those on his person, at least until he was released, inspecting the interior of the car was a great deal less intrusive than frisking his person. Moreover, the knife that gave rise to the officers' apprehension was found in the car, suggesting that another weapon might be there as well.

Second, Deputy Howell's inspection of the front seat was "a limited intrusion designed to insure his safety"

(*Adams* v. *Williams*, *supra*, 407 U.S. at 148)—"limited to that which [was] necessary for the discovery of weapons which might be used to harm the officer" (*Terry*, 392 U.S. at 26). The front seat and the area around it were likely locations for any weapon respondent customarily carried in the car, or carried on his person and left in the car when he stepped from it to meet the officers. If respondent had wished to conceal a weapon hastily when the deputies approached, the lowered armrest provided a particularly convenient place. See *Brown* v. *State*, 358 So.2d 596 (Fla. Dist. Ct. App. 1978). And if respondent had reentered the car, any weapons on the front seat would have been immediately accessible to him. Deputy Howell's search therefore constituted no more than "an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer" (*Terry*, 392 U.S. at 29).

2. The Michigan Supreme Court gave two reasons for its conclusion that Deputy Howell's inspection of the front seat nonetheless violated the Fourth Amendment. First, the court asserted that *Terry* applies only to searches of the person and simply "did not authorize the search of an area" for weapons (Pet. App. 18)—even, apparently, if the area was accessible to the suspect and was a likely location for a dangerous weapon. In our view this premise is wholly untenable. The purpose of a limited *Terry* search is to enable an officer to protect himself from the risk of physical harm, and a suspect can endanger an officer by obtaining a weapon from a nearby area just as he can by using a weapon concealed on his person. See, *e.g.*, *United States* v. *Johnson*, 637 F.2d 532, 535 (8th Cir. 1980); *United States* v. *Rainone*, 586 F.2d 1132, 1134 (7th Cir. 1978), cert. denied, 440 U.S. 980 (1979) (footnotes omitted):

> [W]here the suspect is driving an automobile, a pat-down of the outer clothing may not be sufficient to assure the safety of the police officer. In those cases there is the real possibility that a weapon may have

> been secreted in a part of the automobile readily accessible to the suspect. This is particularly true where the suspect remains in the car, but is also true even where the suspect has been removed from the car. In the latter instance there is still a risk that the suspect may break away or that he may have a motive to kill the officer even after returning to his car.

Because the suspects in *Terry* were stopped while walking on a city street, *Terry* itself had no occasion to consider anything other than a search of a suspect's person for weapons. This Court's decisions dealing with searches incident to arrest have considered a wider variety of circumstances, however, and are a useful analogy. There is no question that a search incident to arrest may extend beyond the arrestee's person to a nearby area. See *Chimel* v. *California*, 395 U.S. 752, 762-763 (1969). And while a *Terry* search for weapons is more limited in scope because it cannot extend to objects or places that could not hold a weapon, the Court's explanation for allowing the area near an arrestee to be searched incident to arrest applies to *Terry* searches as well (*Chimel* v. *California*, *supra*, 395 U.S. at 762-763):

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. * * * And the area into which an arrestee might reach in order to grab a weapon * * * must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested.

The Michigan Supreme Court did not even attempt to explain why this reasoning should not apply to a *Terry* stop.

The second basis of the Michigan Supreme Court's disapproval of the limited search of the front seat was that because respondent was "standing near the rear of the vehicle under the control of Deputy Lewis * * *, [a]ny weapon which might have been hidden in the car would have been out of the reach of [respondent] and thus not a danger to the deputies" (Pet. App. 18-19; footnote omitted). As a factual matter, the Michigan Supreme Court's assessment of the situation appears to be incorrect; respondent was standing near the car, was not handcuffed or held at gunpoint, and apparently might have been able to overpower at least Deputy Lewis. In these circumstances a weapon in the car would certainly have been a danger to the deputies:

> It takes little imagination to realize that an armed suspect might hide his weapon in a car before getting out in response to a police order. Thereafter standing next to the car without handcuffs, [the suspect] * * * could have bolted to it, seized a weapon and fired before the officers could find cover.

United States v. *Wilkerson*, 598 F.2d 621, 625 (D.C. Cir. 1978). Had the respondent done so, the result could have been "at the least * * * a dangerous scuffle for access to the weapon" (*United States* v. *McClinnhan*, 660 F.2d 500, 504 (D.C. Cir. 1981)).

3. The Michigan Supreme Court's more fundamental error, however, was its attempt to reassess the degree of danger faced by the officers in the particular situation, and its implicit suggestion that the officers should have found some other way of protecting themselves, such as placing respondent under more complete control. This Court has repeatedly emphasized the dangers of "litigat-[ing] in each case the issue of whether or not there was present" sufficient basis for a police action. *United States* v. *Robinson*, 414 U.S. 218, 235 (1973); see, *e.g.*, *United States* v. *Ross*, *supra*, slip op. 5; *New York* v. *Belton*, 453 U.S. 454, 458-459 (1981). It is difficult even

to reconstruct the precise circumstances that existed when Deputies Howell and Lewis stopped respondent, and more difficult to judge how a reasonable officer would have reacted at the time. See *Terry*, 392 U.S. at 13.

The deputies had to strike a balance among several important interests, not all of which could be fully protected—respondent's privacy interest in his car; his interest in being free from excessive restraints on his movement; and their own safety. The situation was fluid, hazardous, and multifaceted; to a great degree, the officers' reactions were necessarily instinctive. It is highly desirable to have a relatively simple and clear rule to govern such encounters, if a rule adequately reflecting constitutional values can be specified, instead of leaving the officers at large and placing courts in the position of second-guessing their judgments.

We have already suggested above that a *Terry* stop is analogous to an arrest for purposes of determining the allowable scope of an incidental protective search. In *New York* v. *Belton*, *supra*, the Court dealt with a search incident to arrest in circumstances closely resembling those present here, and adopted a bright line rule that allows police officers to search a car incident to arrest even when the arrestees have been removed from the car. In our view, an analogous rule should apply here: officers should be allowed to conduct a limited search for weapons in a car when they suspect that the person they have stopped on reasonable suspicion of criminal activity might be armed and dangerous, and courts should not speculate, after the fact, about the alternative measures the officer might have taken to prevent the suspect from gaining access to the car.

In *Belton*, a state trooper stopped a car on a highway for speeding. After the stop, he acquired probable cause to arrest the occupants for possession of marijuana. He ordered the occupants out of the car, placed them under arrest, and searched the car's interior while the suspects stood on the road, some distance away from both the car

and each other. See 453 U.S. at 455-456. In concluding that the trooper's actions constituted a lawful search incident to arrest, the Court deliberately did not rest its decision on the specific circumstances at the arrest scene —the number of officers and suspects, the means available to the officer to control the suspects, or whether any of the suspects would actually have been able to reenter the car. Instead, the Court emphasized that a "'single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" *Id.* at 458, quoting *Dunaway* v. *New York*, 442 U.S. 200, 213-214 (1979).

The Court then adopted "the generalization that articles inside * * * the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" 453 U.S. at 460, quoting *Chimel* v. *California*, *supra*, 395 U.S. at 763 (brackets in original). The Court "defin[ed] * * * the limits of the area that may be searched in light of that generalization" and accordingly held that an officer may, "as a contemporaneous incident of [the] arrest [of the occupant of an automobile], search the passenger compartment of that automobile." 453 U.S. at 460.

This reasoning applies at least as strongly to a limited search of a car for weapons, conducted after the car has been stopped and the occupant has left the car but is not under arrest. First, for several reasons, the generalization on which *Belton* was based—that a suspect, even if outside a car, can gain access to a weapon inside the passenger compartment—is more likely to be true in the context of a stop. To begin with, the extent to which the police may "control" a suspect whom they have no probable cause to arrest is limited, and the limitations are unclear. For example, respondent's counsel suggested at the preliminary examination that Deputy Lewis might have held respondent at gunpoint to protect his safety (H. Tr.

27-28); but some courts have suggested that drawing a gun converts a stop into an arrest and may not lawfully be done in the absence of probable cause. See *United States* v. *Ceballos*, 654 F.2d 177, 182-184 & n.7 (2d Cir. 1981) (citing cases). In general, courts approach the question whether a particular display of force or restraint on the suspect has converted a stop into an arrest on the premise that "[e]ach situation is unique, involving the weighing and measuring of contrary indicators." *United States* v. *White*, 648 F.2d 29, 34 (D.C. Cir.), cert. denied, 454 U.S. 924 (1981). Compare *United States* v. *Strickler*, 490 F.2d 378 (9th Cir. 1974) (encircling suspect's car with police vehicles and drawing guns constitutes an arrest), and *United States* v. *Lampkin*, 464 F.2d 1093, 1095 (3d Cir. 1972) (drawing gun converts stop into arrest), with *United States* v. *Coades*, 549 F.2d 1303 (9th Cir. 1977) (drawing gun does not convert stop into arrest), and *United States* v. *White*, *supra*, 648 F.2d at 35 (same) (citing cases). See also 3 W. LaFave, *Search and Seizure* 31 (1978) (locking suspect in police vehicle "would [not] ordinarily be a permissible part of a stopping for investigation[; n]or can it be said that such action would *never* be permissible * * *. Similarly, handcuffing of the suspect is not ordinarily proper [citing *People* v. *Gabbard*, 78 Ill. 2d 88 (1979); *People* v. *Tebedo*, 81 Mich. App. 535, 265 N.W.2d 406 (1978)], but yet may be resorted to when necessary [citing *United States* v. *Purry*, 545 F.2d 217 (D.C. Cir. 1976)]").

Consequently, officers making an investigatory stop—unlike officers making an arrest—may be unable lawfully to take the measures customarily used to prevent a suspect from breaking away and reentering a car. Moreover, because the distinction between a stop and an arrest is unclear, officers may fail to take steps lawfully available to them to control a suspect because they do not want inadvertently to place him under arrest. In these respects, it is more important that an officer making a stop be able to inspect a nearby automobile that he reasonably

suspects might contain a concealed weapon than it is that an officer making an arrest be able to do so.

There are other ways in which officers who have stopped a suspect for questioning are in a more vulnerable position than officers who have effected an arrest. The purpose of a stop, unlike an arrest, is generally to allow the officer to "investigat[e] at close range" and determine whether criminal activity is afoot. See *Terry*, 392 U.S. at 24. For the duration of the stop, therefore, the officer will be in face-to-face contact with the suspect. In these circumstances an officer is highly vulnerable to any weapon the suspect is able to obtain. The officer may, in addition, require an appreciable amount of time to complete his inquiry and determine whether to arrest the suspect or to allow him to proceed; the suspect remains a threat to break away, and the officer remains vulnerable, throughout that period. "[P]ractical necessity requires that [the Court] allow an officer in these circumstances to secure thoroughly the automobile without requiring him in haste and under pressure to make close calculations about danger to himself" (*Robbins* v. *California*, 453 U.S. 420, 431 (1981) (Powell, J., concurring)).

In this connection, it is noteworthy that the courts of appeals have consistently recognized the hazards confronting officers who have made an investigative stop and have generally permitted a limited weapons search of a nearby place or container—even if the suspect could, in theory, be separated from the place or container, and even where a relatively substantial privacy interest was at stake. See, *e.g.*, *United States* v. *Romero*, No. 80-2181 (10th Cir. Nov. 4, 1982), slip op. 7; *United States* v. *McClinnhan*, *supra*, 660 F.2d at 504 (McGowan, J.) (search of briefcase during investigatory stop) ("[G]eneral discussions of personal privacy and public safety are not as useful * * * [as] focusing upon the options available to the investigating officer confronted with a reasonable apprehension of danger."); *United States* v. *Johnson*, *supra* (duffel bag on opposite side of store door from sus-

pect); *United States* v. *Wilkerson*, *supra*; *United States* v. *Rainone*, *supra*, 586 F.2d at 1135 ("[T]here [is] always the likelihood that the suspect will escape and return to the car."); *United States* v. *Powless*, 546 F.2d 792 (8th Cir.), cert. denied, 430 U.S. 910 (1977); *United States* v. *Stevens*, 509 F.2d 683, 688 (8th Cir.), cert. denied, 421 U.S. 989 (1975) ("Hindsight * * * might convince one that the officers were being overly cautious or that they could have dealt with their concern by moving the suspects farther away from the vehicle, but we must view their conduct in terms of what could be considered reasonable under the circumstances then existing."); *United States* v. *Riggs*, 474 F.2d 699 (2d Cir.), cert. denied, 414 U.S. 820 (1973); *United States* v. *Green*, 465 F.2d 620 (D.C. Cir. 1972). See also *United States* v. *Kent*, No. 81-5776 (11th Cir. Nov. 22, 1982), slip op. 595-596.

A second reason for applying the rule of *Belton* in this context is that a limited search of a car for weapons is less of an intrusion into the suspect's privacy than a search incident to arrest. As we have said, a *Terry* search canot exceed the limits of its justification; it cannot include a search of places where a weapon could not reasonably be secreted. See, *e.g.*, *Adams* v. *Williams*, *supra*, 407 U.S. at 146; *Sibron* v. *New York*, 392 U.S. 40, 65 (1968). It is not clear, for example, whether the jacket pocket searched in *Belton* could have been searched in this case. Moreover, an officer may not conduct a *Terry* search of an area unless he has a reasonable apprehension that there might be a weapon in the area. A thoroughgoing search incident to arrest requires no such justification. To this extent, the Court can properly be less hesitant in permitting a limited weapons search on the basis of the generalization identified in *Belton* than it was in permitting a search incident to arrest.

Third, a brief inspection for weapons like that undertaken by Deputy Howell is—unlike a search incident to arrest—often the only practical alternative to substantially more intrusive action. Any means of controlling a suspect by placing restraints on his freedom of move-

ment—even if it does not amount to an arrest—can be offensive and humiliating. It is difficult to believe, for example, that many people would rather be handcuffed or locked into the back of a police vehicle while they were questioned, than allow the officers to take measures like those adopted by Deputy Howell.[4]

Moreover, restricting an officer's ability to ensure his safety during a stop will create pressure on the officer to make an arrest where he otherwise would not. Here, for example, we understand that under Michigan law the deputies could have effected a full custodial arrest of respondent for speeding, although that was not the normal procedure. Had the deputies known that they could not lawfully ensure their safety by looking in the car for weapons, they might well have decided to arrest respondent instead, so that they would be able both to place him under control and, in all likelihood, to conduct a full search of both the car and respondent's person incident to arrest. See *United States* v. *Robinson*, *supra*; *Adams* v. *Williams*, *supra*. Similarly, an officer may have probable cause when he first stops a suspect, but may wish to make inquiries in order to determine whether the suspect can explain the suspicious circumstances so that an unnecessary arrest will be avoided. If the officer cannot ensure his own safety while he is questioning the suspect, however, he will not hesitate to make the arrest.

Finally, if a suspect is allowed to leave after a stop, he will of course return to his car. If a weapon is concealed in the car there is some danger that he will use it on the officers. See *United States* v. *Romero*, *supra*, slip op 7; *United States* v. *McClinnhan*, *supra*, 660 F.2d at 504; *United States* v. *Green*, *supra*, 465 F.2d at 625. While a

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[4] It is, of course, wholly unrealistic to expect officers, reacting quickly to a hazardous situation, to give a suspect a choice among security measures; in view of the difficulty the deputies had in even obtaining respondent's driver's license and registration, for example, it cannot be suggested that they should have pursued that course here.

suspect who has been stopped and released may ordinarily have less reason to attack the officers than an arrestee, he will not *always* have less incentive to do so,[5] and he will always have more opportunity to obtain a weapon. Consequently, if the officers reasonably suspect that there might be a weapon in a car and that the suspect may be dangerous, it is reasonable for them to insist on inspecting the car before they allow the suspect to reenter it—no matter how able they may have been able to control him while the stop lasted.

An investigatory stop, of course, must culminate either in the suspect's arrest or in his release. If the suspect is arrested, *Belton* permits a full search of the car; if he is to be released, and the police reasonably believe there might be a weapon in the car, they have, for the reasons stated, ample grounds to conduct a limited weapons search of the car. It is, therefore, pointless to deny the officers the authority to inspect the car for weapons as soon as they have reasonable suspicion that the suspect may be armed and dangerous.

II. THE FOURTH AMENDMENT PERMITS AN INVENTORY SEARCH OF THE UNLOCKED TRUNK OF A CAR ABOUT TO BE TOWED

1. After respondent was arrested, Deputy Howell opened the trunk of his car. The trunk had no lock and apparently could be opened by reaching into an opening from which the lock had been "punched out." See Pet. App. 15-16. Deputy Howell found 75 pounds of marijuana in the trunk.

Although the search of the trunk seems to us clearly lawful as incident to respondent's arrest (see page 25

[5] "[T]he suspect * * * may have a motive to kill the officer even after returning to his car * * * [if he] has engaged in criminal activity which he believes will be later discovered. Since the police officer * * * has learned the suspect's identity, he will often be able to connect the suspect to the later-discovered crime * * *." *United States* v. *Rainone*, *supra*, 586 F.2d at 1134-1135 & n.3.

note 7, *infra*), the State now defends the opening of the trunk solely on the ground that it was undertaken in order to inventory the contents before impounding the car. See Pet. iii; *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). When he opened the trunk, Deputy Howell had already determined that respondent's car would have to be towed, because it was partially blocking the road and respondent was under arrest. Deputy Howell testified that he opened the trunk at least in part because he wanted to take an inventory of any valuables before the car was impounded.

The Michigan Supreme Court did not consider the inventory search rationale, however, because it concluded that the trunk could not have been searched in any event if marijuana had not been discovered in the front seat by a search it considered unlawful.[6] Should the Court agree with us that the limited weapons search of the front seat was authorized by *Terry*, the Court could reasonably choose to permit the Michigan Supreme Court to consider, in the first instance, the possible justifications for the search of the trunk.[7]

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[6] This conclusion is not obviously correct. Respondent's behavior suggested that he may have been unfit to drive the car, and it is unclear from the record whether the car became disabled when it was driven off the road. It is therefore possible that the car would have been towed even if respondent had not been arrested for possession of marijuana.

[7] We note in this connection that even if the opening of the trunk was not justified under *Opperman* as an inventory search, it was surely lawful as a search incident to arrest under *Belton*. *Belton* explicitly dealt only with the passenger compartment of a car, and its application to a locked trunk is unclear. But an unlocked trunk that could, apparently, be opened with only slightly more difficulty than a car door is as accessible to an arrestee as the passenger compartment of a car. Since at the time of respondent's arrest he was not far from the trunk, the rationale of *Belton* extends to Deputy Howell's search of the trunk.

We also note that the discovery of marijuana in the front seat may well have given the deputies probable cause to search the car as a whole (see *Robbins* v. *California*, 453 U.S. 420, 451 & n.13 (1981) (Stevens, J., dissenting)), in which event a warrantless search of the trunk (see *United States* v. *Ross*, *supra*; *Chambers*

2. In the event the Court addresses the question whether the search of the trunk was a valid inventory search, however, we offer the following observations. That search differed from the search upheld in *Opperman* in three arguably material respects. First, while Deputy Howell stated that he had a personal practice of taking an inventory of vehicles that were to be towed, we do not understand the State to claim that he was following a generally applicable policy of the police department. Second, respondent's car was inventoried on the scene, not in the police lot. Third, the officers conducting the inventory in *Opperman* examined the inside of a locked passenger compartment, including an unlocked glove compartment; Deputy Howell examined an unlocked trunk. Compare 428 U.S. at 365-366 with Pet. App. 16.

We recognize that the first of these distinctions is significant, and renders the inventory justification for Deputy Howell's search of the trunk weaker than the justification offered in *Opperman*. See *South Dakota* v. *Opperman*, *supra*, 428 U.S. at 383-384 (Powell, J., concurring). But see *United States* v. *Prescott*, 599 F.2d 103 (5th Cir. 1979). We submit, however, that the other two differences do not undermine the inventory rationale.

The inventory search is a "response to three distinct needs: the protection of the owner's property while it remains in police custody * * *; the protection of the police against claims or disputes over lost or stolen property * * *; and the protection of the police from potential danger." *South Dakota* v. *Opperman*, *supra*, 428 U.S. at 369. By conducting an inventory on the scene, and an inventory of an unlocked trunk, a police officer substantially furthers these interests. An inventory taken on the scene, as soon as the officers have determined that a car will be towed, reduces the time during which valuables are not secured and dangerous objects not removed. More-

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v. *Maroney*, *supra*), would be permissible. See also *United States* v. *Haley*, 669 F.2d 201, 203-204 (4th Cir.), cert. denied, No. 81-1815 (June 14, 1982).

over, the fewer hands a vehicle passes through before it is inventoried, the less the possibility of claims of theft against the police—and of actual theft. See *South Dakota* v. *Opperman*, *supra*, 428 U.S. at 378-379 (Powell, J., concurring). This may be a particularly important concern when the police use a private towing contractor.

At the same time, we can discern no reason to consider an inventory on the scene to be any more intrusive then a later inventory of an impounded vehicle. Indeed, the owner is more likely to be on the scene, and he may—by taking possession of objects found in the vehicle, for example—be able to limit the intrusiveness of the search.

An unlocked trunk is plainly more vulnerable to theft than a locked passenger compartment; it is arguably more vulnerable even than an unlocked passenger compartment, because a thief can obtain its contents more quickly. An inventory of an unlocked trunk is therefore at least as necessary as the search upheld in *Opperman* if the police are to protect the interests that justify an inventory search. Indeed, several courts of appeals have upheld inventory searches of *locked* trunks. See, *e.g.*, *United States* v. *Edwards*, 577 F.2d 883, 893-894 & n.23 (5th Cir.) (en banc), cert. denied, 439 U.S. 968 (1978); *United States* v. *Smith*, 621 F.2d 483, 488 (2d Cir. 1980), cert. denied, 449 U.S. 1086 (1981); *United States* v. *Martin*, 566 F.2d 1143 (10th Cir. 1977). See also *State* v. *Prober*, 297 N.W.2d 1, 6-7 (Wis. 1980). Compare *United States* v. *Wilson*, 636 F.2d 1161 (8th Cir. 1980), with *United States* v. *Maier*, No. 82-1218 (8th Cir. Oct. 27, 1982). In addition, it seems clear that because an unlocked trunk is so accessible to strangers, an owner's expectation of privacy in its contents is significantly less than his expectation of privacy in a glove compartment inside a locked car. For these reasons, we submit that both the fact that it occurred on the scene and especially the fact that it involved an unlocked trunk strengthen the inventory rationale and support the lawfulness of the second search.

CONCLUSION

The judgment of the Michigan Supreme Court should be reversed.

Respectfully submitted.

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{SHOW } PROCEEDINGS AND ORDERS DATE: 022383

CASE NBR 82-1-00256 CSY
SHORT TITLE Michigan DOCKETED: Aug 13 1982
VERSUS Long, David Kerk

Date	Proceedings and Orders
Aug 13 1982	Petition for writ of certiorari filed.
Sep 10 1982	Brief of respondent David Kerk Long in opposition filed.
Sep 15 1982	DISTRIBUTED. October 8, 1982
Oct 12 1982	Petition GRANTED.
	**********
Nov 24 1982	Joint appendix filed.
Nov 24 1982	Brief of petitioner State of Michigan filed.
Nov 24 1982	Brief amicus curiae of Gulf & Great Plains Legal Foundation, et al. filed.
Dec 6 1982	Brief amicus curiae of United States of America filed.
Dec 20 1982	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 21 1982	Brief of respondent David Kerk Long filed.
Jan 3 1983	CIRCULATED.

CONTINUE {

PROCEEDINGS AND ORDERS DATE: 022383

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Date	Proceedings and Orders
Jan 10 1983	Motion of the Solicitor General for leave to participate in oral GRANTED.
Jan 19 1983	SET FOR ARGUMENT. Wednesday, February 23, 1983. (2nd case)
Feb 23 1983	ARGUED.